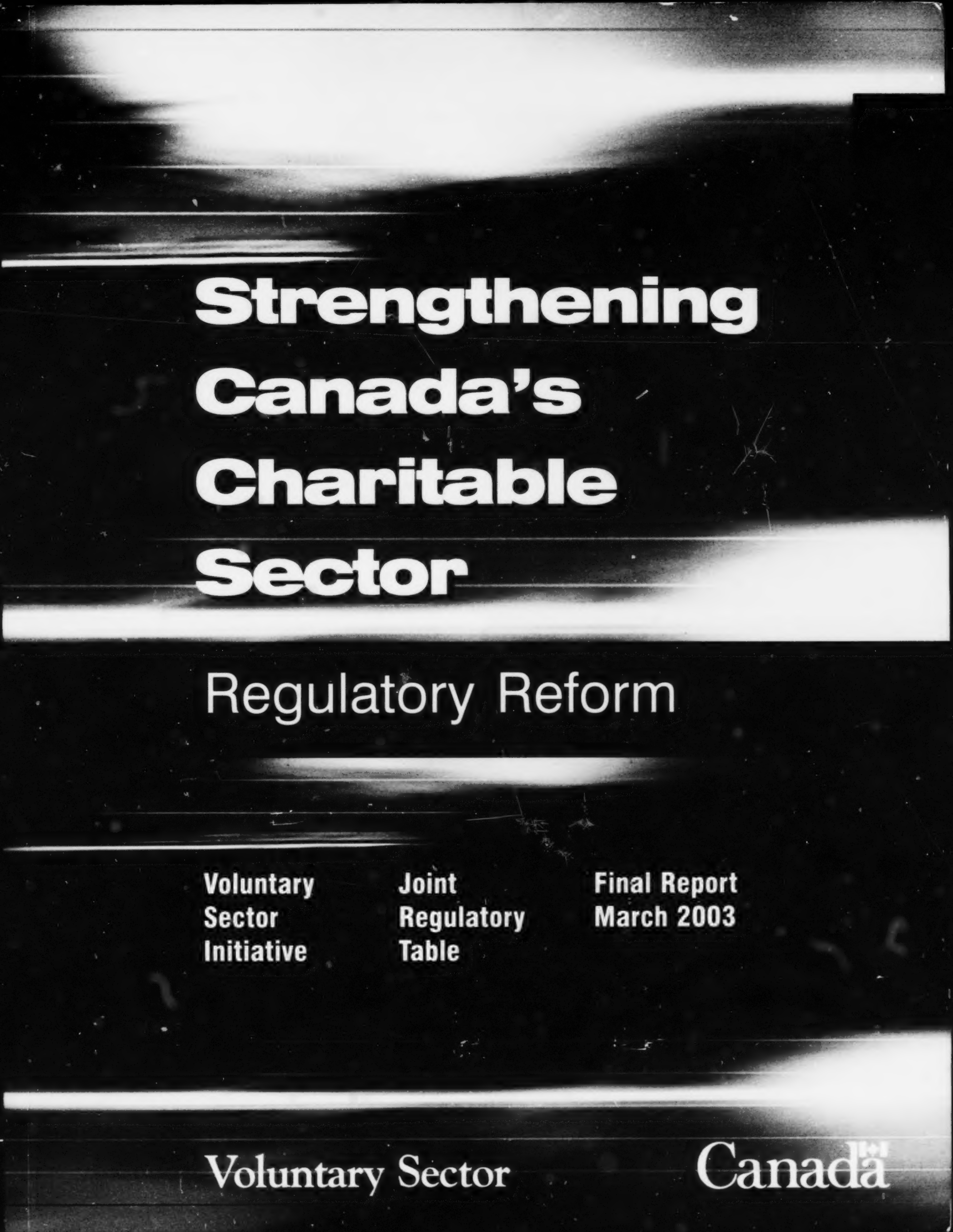

Strengthening Canada's Charitable Sector

Regulatory Reform

Voluntary
Sector
Initiative

Joint
Regulatory
Table

Final Report
March 2003

Voluntary Sector

Canada

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Partnering
For the Benefit of Canadians

Un Partenariat
au profit des Canadiens et des Canadiennes

Initiative between the
Government of Canada and
the Voluntary Sector

Initiative entre le gouvernement
du Canada et le secteur
bénévole et communautaire

March 2003

The Honourable John Manley
Minister of Finance
House of Commons

The Honourable Elinor Caplan
Minister of National Revenue
House of Commons

c.c. The Honourable Sheila Copps
Minister of Canadian Heritage
and Minister Responsible for the Voluntary Sector
House of Commons

We are pleased to present this report for your consideration.

The report was prepared by the Joint Regulatory Table, a working group which was convened in November 2000 under the Voluntary Sector Initiative to study and make recommendations for improving the legislative and regulatory environment in which the voluntary sector operates.

Table members were drawn in equal numbers from the government and voluntary sector. Members were chosen on the basis of their expertise, experience and willingness to work collaboratively rather than as representatives of organizations. The views presented, therefore, are those of the participants, not those of their respective organizations.

The report examines the federal regulation of charities and looks at options for change in four key areas:

- accessibility and transparency of the federal regulator, including making information it holds about charities available to the public;
- better access to appeals for organizations that disagree with decisions made by the regulator;
- compliance reforms, such as the possibility of introducing new sanctions to ensure charities meet their legal obligations; and
- institutional models.

Canada

Voluntary Sector/
Secteur bénévole et communautaire

In addition to the four regulatory areas discussed in this report, the Table was also active in two other areas. It worked with the Canada Customs and Revenue Agency in developing a shorter annual reporting form for charities, and drafting guidelines on the type and degree of business activity charities can legally engage in.

As the Table pursued its work, it realized that its proposals in the various subject areas were, in fact, interdependent. For example, recommended changes related to sanctions implied change in the appeals process. Members also realized that the recommendations are dependent on the institutional context in which they might be implemented. For these reasons, many of the recommendations are interwoven and form an integrated framework. This will need to be considered in future discussions on implementation.

To ensure that the implications of any regulatory changes were fully considered, the Table held consultations on an interim report during the Fall of 2002. People from a wide range of voluntary sector organizations, their advisors, provincial government departments and the general public offered their views on the interim recommendations.

The interim report was largely supported in the consultation process, and has given us confidence we are on the right track. We wish to thank the more than 500 Canadians who participated in the consultations, as well as the 24 organizations that submitted formal briefs, for sharing their insights and expertise with us.

Given the support expressed during consultations, we are proud to commend this report to the Government of Canada. We also believe the views presented in the report will be of interest to a wider audience of Canadians, including those in the voluntary sector, their advisors, government officials, donors, the general public and many in the business, academic and labour communities. To this wider audience, whose support is vital to the health and development of Canada's charitable sector, we also commend the report.

M. Kidd

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Sector Co-chair
Joint Regulatory Table

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Executive Summary

Executive Summary

The Joint Regulatory Table was formed in November 2000, as part of the federal government's Voluntary Sector Initiative, to continue the work on regulatory issues that had begun in *Working Together*. The Table was asked to consider three issues and make recommendations to government. These issues were:

- increasing the transparency of the regulatory process;
- improving the system for appealing decisions made by the regulator; and
- introducing a range of penalties for non-compliance with legal requirements.

The Table was also asked to develop and discuss further the institutional models, identified in the *Working Together* report, within which the regulatory function could be exercised.

In August 2002, we released our interim report and then held public consultations in 21 cities across the country. Many of our interim recommendations received support. However, as a result of the views we received, we have modified some of our initial ideas.

An effective and supportive regulatory framework

The role of the federal charities regulator is to carry out Parliament's intent, as expressed in the relevant parts of the *Income Tax Act*. This involves preventing abuses of the tax system, but it also requires respect for the underlying purpose of the tax law – to encourage support for Canada's charitable sector.

People will support charities if they can see that the regulator is acting effectively, and that charities are meeting their legal obligations. Regulatory effectiveness, in turn, depends on charities seeing that the regulator:

- acts with integrity;
- is open about its decisions and performance;
- is committed to high standards of service; and
- is willing to work with the sector in seeking knowledge and innovation.

Our proposals for reforming the transparency of the regulator's work, the appeals system and intermediate sanctions will work best if they are accompanied by changes in the way the regulator operates.

First, the regulator needs to play a more active role in:

- educating the sector about legal requirements; and
- providing the general public with information about the regulatory process, and the information that is available about charities and how they operate.

Second, the regulator should also work to increase its visibility so the public is aware of what it does and how people can contact it.

Third, to perform its work properly, the regulator needs the human, technological and financial resources to carry out its mandate.

Fourth, new guidelines are needed on the nature and extent of the regulator's authority to register new types of organizations under the *Income Tax Act*.

Fifth, an effective regulatory system for charities in Canada – one that the public understands and that reduces the regulatory burden on charities – implies a measure of federal-provincial-territorial co-ordination. The different authorities need to be able to share information and discuss issues of common concern, especially when dealing with organizations that can harm the reputation of the sector.

Sixth, the federal regulator should adopt new mechanisms to enhance communications and outreach to the sector, including:

- a ministerial advisory committee to provide advice on administrative policy;
- increased and ongoing policy consultations; and
- an annual report on the regulator's performance and activities.

Accessibility and transparency

Our recommendations focus on increasing trust in:

- the regulator by making its operations more transparent, and
- the sector by making more information about charities accessible.

Regulatory transparency should be enhanced in the registration process. Currently, only limited information is available on request about organizations that succeed in obtaining registration. We recommend that the regulator publish reasons for each registration decision – both positive and negative. The same documents that are now available on request for registered organizations should also be available for organizations that are denied registration.

Transparency could also be extended to the publication of the results of the regulator's compliance program – namely audits. However, because of the potential of unnecessarily harming an organization's reputation, we recommend not releasing specific information about these audits. Instead, aggregate results from the compliance program should form part of a proposed annual report published by the regulator. Only if a major sanction is imposed should an organization be identified.

The basis on which the regulator makes its decisions should also become more transparent. The regulator's website should include its policies and the research database used by its employees.

Finally, trust in the sector will be enhanced by providing more information about charities to the public. To this end, the public should have access to the financial statements that charities have to file with the regulator.

Appeals

In the current system, the first level of formal appeal of a decision by the regulator is the Federal Court of Appeal. Our recommendations deal with the types of recourse that should be available before a case reaches the Federal Court of Appeal.

The regulator should develop an independent unit to review charity cases, including both applications for charitable status and penalties against a charity.

The recourse system should encompass a hearing *de novo*. We conclude that the Tax Court of Canada is the logical and most accessible venue for such a hearing and recommend that careful consideration be given to making the Tax Court the first level of court to deal with appeals from the regulator's decisions.

Because charity law is based on the decisions of the courts, the regulator and the sector need court decisions to clarify the state of the law. However, the cost of court proceedings is often prohibitive, especially for new organizations. Funding should be provided to bring appropriate cases before the court. The Court Challenges Program is a possible model to adopt.

Intermediate sanctions

Currently, the primary penalty available to the regulator is deregistration. This sanction is considered too severe to be an effective remedy. While the need for sanctions can be reduced though education, the regulator needs better tools to handle those cases where charities fail to follow the rules.

The fact patterns found in most cases of non-compliance are highly variable, and thus the regulator needs a good deal of discretion to fit the "punishment" to the "crime." **This discretion must be balanced by a properly functioning recourse system, and our recommendations on intermediate sanctions are made conditional on the existing recourse system being reformed.**

Two new intermediate sanctions are proposed:

- suspending a charity's "qualified donee status" (which means that the organization would not be able to issue official donation receipts for gifts it receives while suspended or to receive grants from foundations); and
- suspending a charity's tax-exempt status (with the tax payable being set as a percentage of the organization's revenue from all sources).

Deregistration would remain the ultimate sanction, but the existing revocation tax needs reformulating. We support the idea put forward by the Ontario Law Reform Commission for a mechanism to re-apply any "tax" monies (including amounts resulting from the loss of tax-exempt status) to charitable purposes.

Two types of compliance problems are sufficiently common for us to propose specific remedies. The first is the failure of some 2,000 charities each year to meet the basic requirement of filing their annual information returns. We believe the regulator's website should be used to identify the charities that are in danger of losing their registration because they are late filing their returns. Also, if a charity loses its registration because it ignores warnings to file its annual return, it should pay a $500 re-registration fee when it re-applies for registration.

The second recurring compliance problem relates to deceptive fundraisers, where donors are asked to support a cause but little if any of their contributions are actually used for charitable purposes. We propose two measures to address deceptive fundraisers. First, presenting false information in order to obtain registration would justify immediate deregistration. In addition, the Federal Court should be able to order an organization to cease fundraising where there are reasonable grounds to believe the public is being harmed.

Finally, the *Income Tax Act* should be revised to more clearly state certain basic provisions (as described in the text of the report) for obtaining and retaining registered status.

Institutional models

Working Together identified three possible institutional models for a federal regulator:

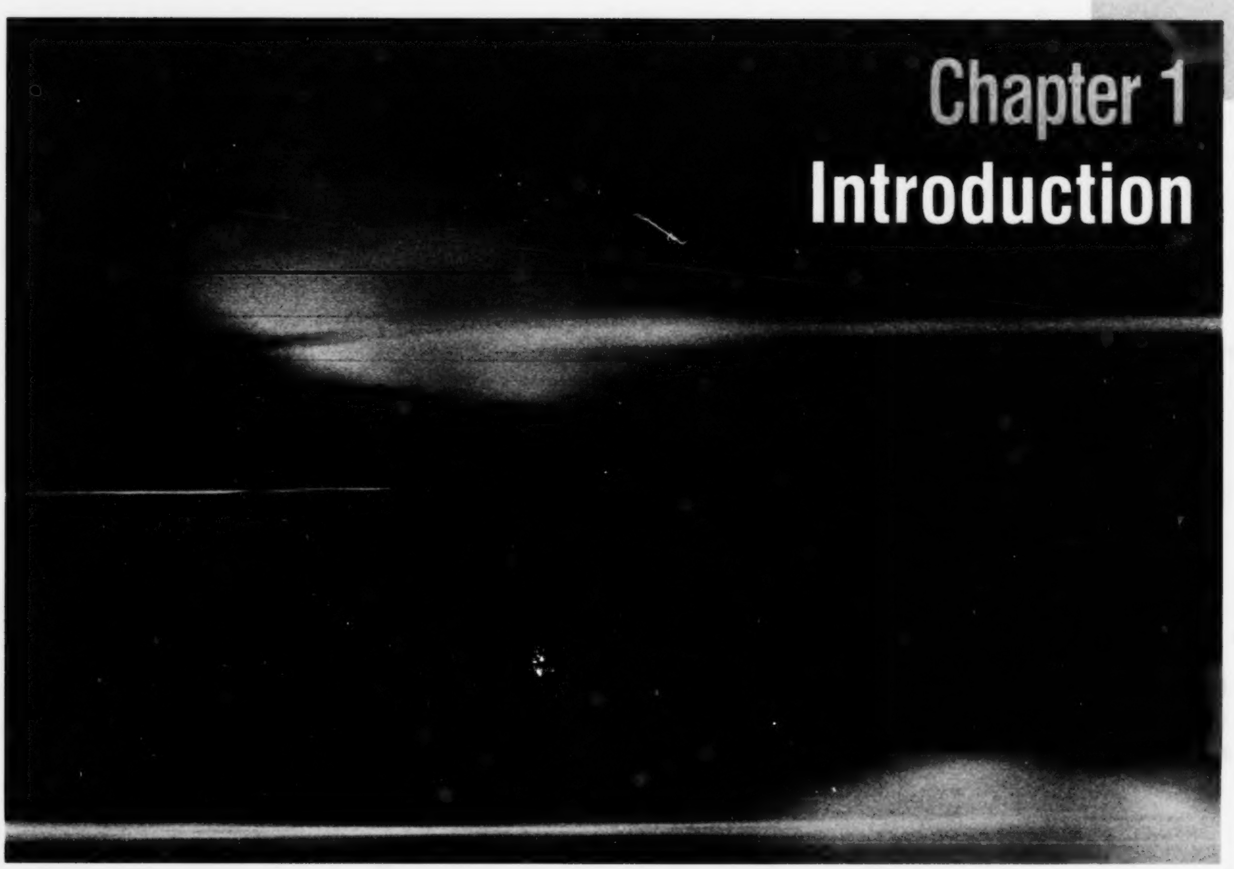
- an improved Charities Directorate within the CCRA;
- an improved Charities Directorate, plus a new voluntary sector agency; and
- a Charity Commission that would assume the regulatory functions currently performed by the CCRA.

We have identified an additional model that falls within this spectrum and, for the sake of completeness, have included it in our report. Under this model, functions would be shared between a Charity Commission and the CCRA, with the Commission concentrating on the regulatory responsibilities involved in registering and deregistering charities.

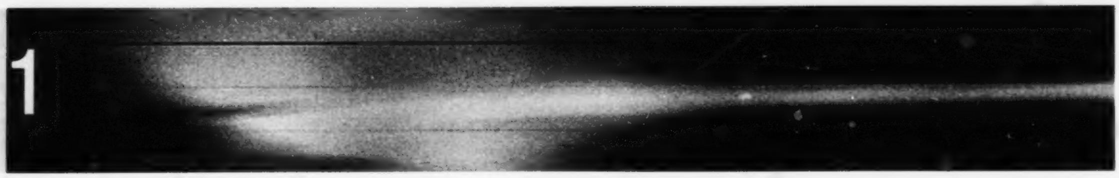
We were not asked to express our preference for one model over another, but rather to provide more information about each of the models to enable a discussion about their respective merits to take place. To this end, we identify a set of criteria that could be used to assess them. The criteria are essentially those we identify as necessary conditions to the operation of any effective regulator of charities, including:

- clarity of its scope and mandate;
- its capacity to operate with integrity, professionalism, innovation and openness;
- its capacity to raise its public profile;
- its capacity to deliver education to the public and the sector;
- its chances of securing adequate resources;
- its capacity to work with charity law in an evolving society;
- its capacity to work with provincial authorities;
- its capacity to extend its scope to the entire voluntary sector; and
- the challenges posed in making the model operational.

Chapter 1
Introduction



Chapter 1



Introduction

The Voluntary Sector Initiative announced in June 2000 is a joint undertaking of the voluntary sector and the Government of Canada. It is a unique opportunity to focus on the voluntary sector of Canadian society – a sector equal in importance to the public and private sectors.

The long-term objective of the Voluntary Sector Initiative is to:

- **strengthen the voluntary sector's capacity to meet the challenges of the future and to serve Canadians; and**
- **improve the relationship between the sector and the federal government in order to better serve Canadians.**

Canada's voluntary sector

The voluntary sector is one of three pillars that make up Canadian society, together with the public[1] and private sectors. Voluntary sector organizations operate in a wide variety of areas such as arts and culture, sports and recreation, education, health and social services, faith, human rights, social justice and environmental protection. Through their staff and volunteers, these organizations work in communities across Canada every day, identifying needs, raising funds and delivering services vital to improving the lives of Canadians. These organizations make a valuable contribution to social cohesion by developing and supporting social, cultural, economic and political values in Canadian communities.

The voluntary sector, in its broadest sense, is composed of all not-for-profit organizations that exist in Canada. Some are incorporated; some are not. Organizations range from community-based self-help groups to national organizations, and include such organizations as neighbourhood associations, service clubs, symphonies, universities, schools, and hospitals. Some, perhaps most, are designed to provide some form of public benefit, while others are professional or focus on member benefits. All are dependent on volunteers, at least on their board of directors.

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[1] The public sector includes all levels of government – federal, provincial, territorial, regional and local.

Process leading to the current review

In 1995, 12 national umbrella organizations covering most parts of the voluntary sector came together as the Voluntary Sector Roundtable (VSR) to strengthen the voice of the voluntary sector. The goals of the VSR were to enhance the relationship between the sector and the Government of Canada, to strengthen the sector's capacity, and to improve the legal and regulatory framework governing the sector.

The VSR commissioned an independent panel of inquiry on how to promote accountability and governance in the voluntary sector. Known as the "Broadbent Panel," its report – *Building on Strength: Improving Governance and Accountability in Canada's Voluntary Sector* – was released in 1999.

During this same period, the Government of Canada was also looking at its relationship with the voluntary sector. The Government recognized the need for a strong, vital voluntary sector to meet the government's goal of improved quality of life for Canadians.

Following the release of the Broadbent Panel report, voluntary sector members and federal officials met in three groups, called "joint tables," to make recommendations on sector/government relationships, to strengthen the voluntary sector's capacity, and to improve regulations and legislation.

One of the joint tables was the Table on Improving the Regulatory Framework. It was established to explore ways to:

- improve the regulation, administration and accountability of charities and other non-profit organizations; and
- examine federal funding support.

On August 29, 1999, the three joint tables released their combined report called *Working Together*. This joint exercise delineated three distinct areas requiring strategic investment and attention:

1. improving the relationship between the government and the sector;
2. enhancing the capacity of the sector to serve Canadians; and
3. improving the legislative and regulatory environment in which the sector operates.

The Joint Regulatory Table was formed in November 2000 to address this third area.

A focus on charities

We have focused our attention on issues connected with registered charities.

The regulation of charities involves various levels of government. The federal government's authority over charities comes primarily from the *Income Tax Act*.[2] That Act makes charities exempt from the payment of income tax. It also allows registered charities to issue receipts for donations, and these receipts allow donors to claim a tax credit for their contributions.

There are, currently, about 80,000 federally registered charities in Canada. In 2001, federal tax revenue from individuals and corporations was reduced by about $1.5 billion as a result of contributions to these charities.[3]

We also recognize that the regulation of charity is not a matter involving only government and the sector. The public has an important "stake" in how charities are regulated.

Charities, as part of the broader voluntary sector, help to cultivate a strong civil society and a federal government connected to citizens. They act as a vehicle for social cohesion and provide opportunities for individual Canadians to volunteer or work on issues of importance to themselves and their communities. Because donors to charities receive tax credits, all Canadians have a financial stake in who is allowed to issue charitable-donation receipts, since it is not simply the donor who is giving money – it is also the taxpayer.

In making final recommendations to ministers, we have attempted to balance the interests of the sector, government and the public.

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[2] This does not mean that the *Income Tax Act* is the only federal legislation that affects charities. There are several other federal statutes affecting charities. For example, the *Canada Corporations Act* identifies the terms and conditions for incorporating non-profit organizations. The *Competition Act* prohibits deceptive fundraising practices, and the *Personal Information Protection and Electronic Documents Act* specifically prohibits the sale of donor, membership and other fundraising lists without the active consent of individuals on the list.

[3] This figure is a conservative estimate of the total tax assistance provided to charities as it excludes the sales tax rebates for charities and the benefits associated with the tax-exempt status of charities. If one were to include provincial revenue not realized, this figure could increase to $2 billion.

The current review

The Joint Regulatory Table examined four fundamental policy issues related to the regulation of charities.

The first issue is **accessibility and transparency** of the regulatory regime. The concern has been that there is not enough information available about registered charities and about how the Canada Customs and Revenue Agency (CCRA) makes decisions, especially decisions on registration and deregistration. Our recommendations in this area focus on increasing public trust in the regulator by making its operations more transparent, and public trust in the sector by making more information about charities available.

The second issue is a **system of recourse** for organizations that disagree with decisions made by the regulator. Under the existing system, appeals of CCRA decisions to deny or revoke charitable registration must be made to the Federal Court of Appeal. We consider how the appeal process can be made easier without making it more cumbersome and costly for charities. At the same time, we look at how more cases can be brought before the courts, so that the decisions can clarify charity law in complex or novel cases. Our recommendations deal with access to lower levels of appeal before a case reaches the Federal Court of Appeal.

The third issue is the possibility of introducing **intermediate sanctions** for charities that are not complying with the rules for continued registered status. Under the *Income Tax Act* there is only one consequence for not complying with the rules for continued registered status and that is deregistration. This penalty is considered by many to be too harsh except for severe breaches of the law. To ensure public confidence in the sector is not undermined, we are recommending that new sanctions be introduced. However, we place an emphasis on the need for the regulator to better educate charities about the rules and to work with charities to remedy problems.

Finally, we examine the issue of **institutional reform**. Building on the work of the 1999 Joint Tables process, four models for the federal charities regulator are considered. The models include an enhanced Charities Directorate that would continue to operate within CCRA, a complementary agency that would work alongside CCRA, a hybrid model that would split regulatory functions between two institutional bodies, and an independent commission. Each model can be assessed in terms of its ability to:

- ensure public confidence in voluntary organizations;
- maintain the integrity of the tax system; and
- ensure a supportive and enabling environment for voluntary organizations.

In addition to these four broad policy issues, the Joint Regulatory Table also worked on two other regulatory matters.

The first was to simplify the annual information return (T3010) filed by all registered charities. We worked with the CCRA to develop the shorter annual reporting form that is now in use. The second issue was to clarify the rules on related business activities under the *Income Tax Act*. We worked with the CCRA to develop draft guidelines on the type and degree of business activity in which charities can legally engage. These draft guidelines served as the basis for further consultations, both inside and outside the charitable sector.

Consulting with Canadians

In August 2002, we released a report containing our interim recommendations. We held consultations in 21 cities across Canada in the Fall of 2002 to seek the views of those in the voluntary sector; their advisors; federal and provincial government officials; people currently involved – directly or indirectly – in regulating or supervising charities; and the general public. For a report on the consultations, please see Appendix 2.

The recommendations in our interim report were largely supported in the consultation process. We have made some changes of detail and emphasis to reflect what we heard during the consultations. For example, the need for education has received more attention in this report.

Organization of the report

The next chapter provides a sketch of the current regulatory system. It contains background information that readers will need to understand our recommendations. Next, we discuss the requirements, in our view, of a sound regulatory framework for charities. The remaining chapters each cover a specific area of the Table's mandate.

Within each chapter, we have included what we initially said in our interim report, what we heard during our consultations, our conclusions and recommendations. We believe this organization will assist the reader in following the reasoning behind our recommendations and the evolution in our thinking.

Chapter 2

Federal Regulation of Charities in Canada

Chapter 2

Federal Regulation of Charities in Canada

The federal government's authority over charities comes primarily from the *Income Tax Act*[1]. That Act makes charities exempt from the payment of income tax. It also allows registered charities to issue receipts for donations. These receipts allow donors to claim a tax credit for their contributions.

Canada's constitution gives the provinces responsibility for supervising charities that are "in and for" the province. Some provinces, notably Ontario, have sophisticated systems for registering and supervising charities, ensuring that charitable assets are used only for charitable purposes. Other provinces (and some municipalities) have introduced fundraising legislation. The majority of provinces do not regularly supervise charities. They may also use a different definition of "charity" than does the federal government.

Registration

An organization that wants to become a registered charity must apply to the Charities Directorate of the Canada Customs and Revenue Agency (CCRA). The application includes the purposes for which the charity wishes to be registered. It also contains information about how the charity will achieve these purposes.

The application is reviewed by a Charities Directorate examiner. There is no legislated definition of charity, so the examiner has to compare the application against court cases that have helped explain what is considered to be charitable. Collectively, these cases form what is sometimes known as the common law of charity.

The courts have said there are four types or "heads" of charities. Charities can be created for:

---

[1] This does not mean that the *Income Tax Act* is the only federal legislation that affects charities. See footnote 2 in Chapter 1.

- the relief of poverty;
- the advancement of religion;
- the advancement of education; or
- other purposes beneficial to the public and analogous (or similar) to purposes which the courts have found to be charitable.

The examiner who reviews an application may do one of several things. The examiner may:

- approve the application, sending a letter telling an organization that it has been registered;
- write or telephone the applicant, asking for more information; or
- send a letter, called an "Administrative Fairness Letter," explaining why it appears the application cannot be approved.

In cases where an Administrative Fairness Letter is sent, the organization can submit additional information or arguments. If the examiner is persuaded, then the organization will be registered. If not, the applicant will receive a final letter saying that the application has been denied.

About 4,000 organizations apply for charitable registration each year. Almost 3,000 of the applications are approved. Another 200 receive final letters denying registration. The remaining 800 fail to respond to either a request for more information or to the Administrative Fairness Letter. They are considered to have withdrawn their applications.

If an organization is registered as a charity, its name appears on the list of charities that is maintained on the CCRA website (www.ccra-adrc.gc.ca).

Any member of the public has the right to ask the Charities Directorate for a copy of a registered charity's application for registration. However, if an organization is denied registration, or if it drops out of the process, no information about the application is made available to the public.

Monitoring

The Charities Directorate is responsible for ensuring that charities comply with the *Income Tax Act* and with the rules that have been established for charities.

All charities must file an annual information return with the Charities Directorate. This form contains information about what the charity has done in the previous year as well as financial information. A copy of this return can be made available to any member of the public on request. The charity must also include a copy of its full financial statements with its return, but those statements are only made available to the public if the charity agrees.

The Charities Directorate conducts between 500 and 600 audits each year. An auditor visits the charity and reviews its books and records to ensure that the organization still complies with the laws and procedures. Some organizations are selected at random for an audit; others are selected because of information the Charities Directorate has received or because it has decided to pay particular attention to a certain type of charity.

Some of these audits end with the Charities Directorate saying that no problems were uncovered. Most result in an education letter, telling the charity about problems that were found and identifying what should be done to correct them. In some cases, the Directorate will ask for an undertaking – a promise that the charity will correct the problems. In a very few cases, the Directorate looks to revoke a charity's registration for failing to comply with the law. In these cases, the Directorate writes the charity to give the reasons why it is proposing a revocation and invites the charity to address the concerns raised.

Under the law, the Charities Directorate cannot tell anyone other than the charity involved about an audit. It cannot even confirm whether an audit has taken place. However, if a charity's registration is revoked, the Directorate's letter setting out the reasons for the revocation is publicly available.

Sanctions

If a charity does not comply with the law, the Charities Directorate has only one penalty readily available to it – deregistration, removing the organization's status as a registered charity.

About 2,500 charities are deregistered each year. About 66% of those deregistrations are because the charity has not filed its annual return with the Charities Directorate. Another 30% are made at the charity's request because it has decided to stop operating. In the last five years, very few have been deregistered "for cause" – for some serious violation of the rules governing charities.

Appeals

If an organization feels it has been unfairly denied charitable registration, or had its charitable registration revoked, it may ask the courts to overturn the decision. In that case, the organization takes an appeal to the Federal Court of Appeal.

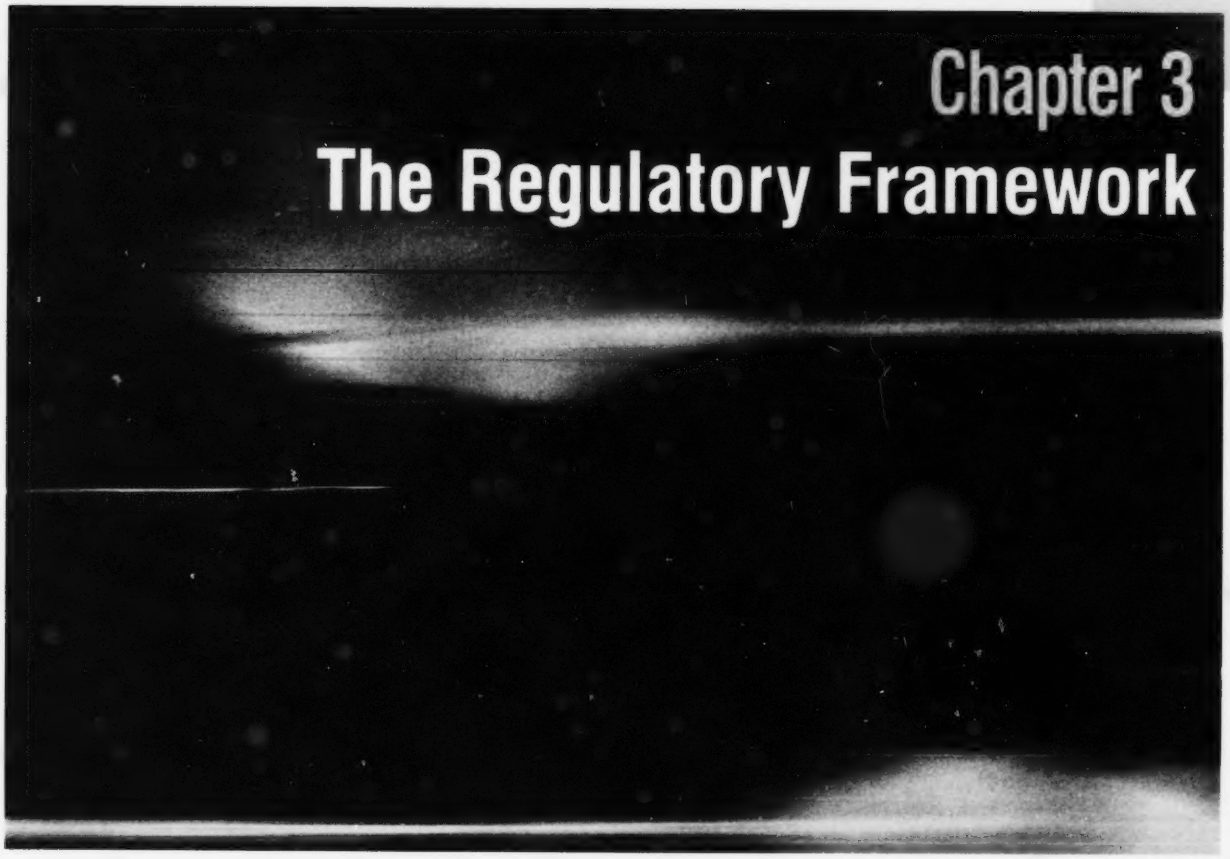
A panel of three judges hears arguments and considers the documents and information that the Charities Directorate used in coming to its decision. Some of this material comes from the application for registration, or from documents obtained during an audit. Other material is gathered by the Charities Directorate as a result of its own research. This is called an appeal "on the record." There is no testimony by witnesses at the appeal.

A further appeal can be taken to the Supreme Court of Canada, if that court grants permission.

These appeals help clarify the law about what is charitable in Canada. Since there is no legislated definition of charity, it is these court decisions that must be used by the Charities Directorate in considering future applications. Over the last 25 years, there has been an average of only one court decision on charity law each year. Decisions from provincial courts and courts in other countries can sometimes be helpful, but are not binding on the Charities Directorate.

Chapter 3

The Regulatory Framework



Chapter 3

The Regulatory Framework

In considering ways to improve the legislative and regulatory environment in which the charitable sector operates, we reviewed and consulted on a wide range of issues. Our goal was to develop a regulatory framework that would enhance public trust and confidence in both charities and the public institution regulating them at the federal level.

In the pages that follow, we provide our response to eight questions that need to be considered when designing an ideal regulatory framework for charities. They are:

- What should be the regulator's scope and mandate?
- What guiding values should the regulator have?
- What sector support and educational services should the regulator provide?
- What public profile and visibility does the regulator need?
- What resources does the regulator need?
- What powers should the regulator have to determine charitable status?
- What relationship should a federal charity regulator have with other regulatory bodies?
- What role should the regulator have regarding not-for-profit organizations?

We also describe three administrative mechanisms and how they can be used to support the regulatory framework.

In Chapter 7, we describe four institutional models for regulating charities and evaluate them against the regulatory framework outlined in this chapter.

Scope and mandate of the federal regulator

The regulation of charities is split between the federal and provincial/territorial governments. Constitutionally, provincial governments are responsible for the establishment, maintenance, and management of charities operating in and for the province, and Parliament has given the same jurisdiction to the territories.

At the federal level, supervision is focused more narrowly on deciding which organizations qualify as registered charities under the *Income Tax Act*, and making sure federally registered charities meet their legal obligations and continue to be entitled to favourable tax treatment.

It is the responsibility of Parliament to set out the broad parameters in terms of the tax benefits it is prepared to grant the charitable sector. The role of the regulator – under any institutional model – is to reflect the intent of Parliament through its administration of the *Income Tax Act*. In designing the system, the regulator must strike a balance between maintaining the integrity of the tax system by protecting it from abuse and providing a supportive regulatory environment for charities. The regulator must also consider the cost of achieving these goals.

A key issue affecting the design of the system is the desire to build and maintain public trust in the regulator and the charitable sector. **Public trust in the regulator** depends to a large extent on the regulator's ability to assure the public that charities operating in Canada are being regulated appropriately, coupled with public access to information. At the same time, the regulator must minimize the cost of compliance on charities and ensure that its resources are used to maximum efficiency.

Sector trust in the regulator is linked to the perception that the regulator is:

- acting fairly and consistently in applying the law;
- committed to keeping the concept of charity up to date and in line with current social developments, statutes and court decisions; and
- involving the sector in a meaningful way in developing administrative policy.

Public trust in charities is linked, at least in part, to the willingness and ability on the part of charities to comply with the law. Another factor is the extent to which charities are seen by the public to be providing a public benefit in exchange for tax assistance.

What we heard

During our consultations, most participants who commented did not specifically respond to our assertion that the primary role of a regulator is to administer the *Income Tax Act*. Instead, most participants reflected on the role of the regulator in enhancing public trust and confidence in charities.

The majority of respondents affirmed our belief that **public trust in charities** depends on the willingness of charities to comply with the law and the extent to which charities are seen to provide a public benefit. Public credibility was seen as essential if charities are to be effective in raising funds and if their work is to be recognized as valuable and contributing to the public good. Many participants noted that the sector and the regulator have a shared responsibility for maintaining public trust.

Some respondents expressed dissatisfaction with the current level of compliance monitoring that occurs once an organization becomes a federally registered charity. They noted that with so few audits being conducted by the regulator each year, other mechanisms are being used to maintain public confidence, such as codes of good practice and ethical standards. These participants suggested that the regulator could enhance public trust in charities by conducting more audits and by disclosing information about charities found to be in serious breach of the law.

The large majority of respondents thought a federal "watchdog" was needed to ensure charities are held publicly accountable given that public funds are at stake. Of those supporting a "watchdog" role, a number added that the public looks to the registered charity number granted by the regulator as a "seal of approval" or statement that the organization adheres to certain standards of practice.

To further enhance public trust in charities, a few participants suggested that the regulator should have additional scope to act as a gatekeeper by encouraging mergers or limiting the registration of branch offices when there is a national body already registered. They noted that there has been a proliferation of charities doing essentially the same thing and that this is confusing to donors. Others suggested that the regulator should become more involved in operational decisions made by charity officers and should hold directors accountable for a charity's failure to achieve the organization's mission.

While not commented on as frequently, **sector trust in the regulator** was also identified as a key outcome of an effective regulatory regime. A number of respondents expressed frustration with the lack of transparency around administrative decision making. The comment was made that the lack of transparency leads to a perception in the sector that there is unfairness, secrecy and arbitrariness from a "distant and unfriendly bureaucracy."

Most participants in the consultation believed there is a conflict in having the regulator both enforce the rules and provide advice. While there was recognition that voluntary sector organizations may need advice when applying for registration or when they run into difficulty with the regulator, providing advice may not be an appropriate role for the regulator. In addition, a number of participants commented on the need for advocacy on behalf of the sector but felt that the regulator could not and should not perform this function.

That being said, virtually all those who commented felt the regulator has a role to play in educating the public about charities, and in providing information and education to help organizations understand the criteria for registration and, once registered, to comply with the law.

A few respondents commented specifically on the legislation, noting that the charity provisions in the *Income Tax Act*, and in particular section 149.1, are vague and in need of revision. Of these individuals, some wondered about the purpose of reforming the regulator if the law is not changed and suggested that a new statute may be needed to make the law easier to apply and understand as well as to raise the profile of the regulator within government and with the general public.

Our conclusions and recommendations

We continue to maintain our view that the primary focus of the regulator should be the administration of the *Income Tax Act* as it relates to charities. However, the comments we received have reinforced to us that trust in both the regulator and charities should be key considerations when designing the ideal regulatory framework.

We also believe that public trust in the regulator depends to a large extent on its ability to assure the public that charities in Canada are being appropriately regulated. Public trust would be enhanced if the public knew more about the review process used to determine if an organization will be granted registered status and who to contact if they have a complaint about a registered charity.

However, we reject the idea of the regulator playing a gatekeeper role. While some charities may have similar charitable programs, we believe the only criterion that should be used by the regulator in deciding whether or not to register a charity is the ability of the charity to meet the requirements of the law.

Nor should the regulator take on a broad support function. Virtually all who commented agreed. However, the volume of comments we received on the issue of education has reinforced to us that the regulator should be more proactive in educating the public about charities, and in providing information and education to help organizations understand the criteria for obtaining and maintaining registration. We address this issue in detail later in this chapter.

Finally, the regulator needs to be seen to be acting fairly if it is to be respected and recognized by the sector as a leader in the regulatory field. The lack of transparency surrounding its registration decisions has contributed to the perception in the sector that the regulator is acting unfairly or inconsistently in applying the law. We acknowledge this has been a long-standing concern, and have proposed specific recommendations to address this issue in Chapter 4. In addition, we believe our recommendations on appeals (see Chapter 5) will provide better means for recourse for voluntary sector organizations if they disagree with a decision of the regulator.

Recommendations

1. **The primary role of the regulator should continue to be to administer the charity provisions of the *Income Tax Act*.**
2. **To enhance public trust and confidence in both the regulator and in charities, four fundamental principles should guide federal regulatory reform:**
    - **2.1 the regulatory framework that governs charities should facilitate public trust in the work of charities in Canada;**
    - **2.2 the regulatory framework should uphold the integrity of the provisions in the *Income Tax Act* that govern charities;**
    - **2.3 the regulatory framework should ensure fair application of the law and transparency in regulatory decision-making processes; and**
    - **2.4 the regulatory process should be as simple, non-duplicative and cost-effective as possible.**

Guiding values

Even while the primary focus of the regulator should continue to be the administration of the *Income Tax Act*, we also considered how the objectives of the Voluntary Sector Initiative could be promoted through institutional reform. In particular, we asked what role the regulator can play in supporting the sector so that the sector can enhance the quality of life of Canadians.

We believe that in order to ensure there is public confidence in both the regulator and registered charities, as well as to reflect the intent of the Voluntary Sector Initiative, four core values are needed to guide the design of a supportive and effective regulatory system:

Integrity

The regulator should provide the highest level of expertise and reach decisions through an impartial, transparent and fair process.

Openness

The regulator should encourage a free exchange of ideas and promote open, timely and constructive communication with those it serves – charities and the public.

Service excellence

The regulator should be committed to delivering high quality services to its clients. It should be the source of timely and authoritative information.

Knowledge and Innovation

The regulator should be forward looking and in step with society's needs and expectations and should use the best available technology to ensure its services keep pace with changing needs. It should be committed to building its capacities in the following areas:

- **Awareness and understanding of society's needs.** To be effective and relevant to Canadian society, the regulator must be able to gather information about changes in its environment. It should be aware of shifts in public values about what is and is not regarded as beneficial to the public and take this into account in shaping the legal understanding of charity in Canada.
- **Policy dialogue.** To encourage broad participation, the regulator should see ongoing dialogue with the sector, other government departments and the broader community as an accepted way of doing business. The federal government is committed, through the Voluntary Sector Initiative, to involve the sector in developing policy. A Code of Good Practice on Policy Dialogue has been developed. The regulator should use this tool to guide its communication with the sector during the policy development process.
- **Continuous learning**. The regulator should have a good understanding of the things it does and does not do well. It should work to continually improve the way it fulfils its mandate. To be innovative and responsive, the regulator should provide opportunities for the sector, its advisors and other stakeholders to participate in developing its priorities and reviewing outcomes. This participation also will provide the regulator with an opportunity to obtain expert knowledge to supplement its expertise. Also, the regulator should promote staff training and professional development to maintain and improve internal expertise and quality of work.

What we heard

Participants in our consultations overwhelmingly supported the core values identified in our interim report. They believed that implementation of the guiding values would enhance transparency and accessibility and lessen the need for sanctions and appeals.

Integrity

Fairness was emphasized as a key element. Virtually all participants who commented agreed that to facilitate public and sector trust, the regulator must be seen to be consistent in applying the law.

Openness

Virtually all participants who commented agreed that the regulator should encourage a free exchange of ideas and communicate actively with the public and the sector. A number of respondents stressed the need for increased communication beginning at the point when an organization applies for registered status. They believed this increased communication would reduce the "fear factor" and resolve misunderstandings earlier in the application process.

Respondents recognized that transparency is a key element of openness. If charities are expected to be transparent, so too should the regulator. Respondents also linked openness to public accountability and felt that public scrutiny of the regulator's performance and decisions is needed to ensure decisions are fair and regulation is effective. A number of respondents commented that openness should also include being responsive to the needs of diverse cultures, including communities in the north and isolated regions, as well as various socio-cultural groups.

Service excellence

Virtually all participants who commented agreed that the regulator should be committed to delivering high quality services to its clients. There were a number of comments about the lack of responsiveness of the regulator and the perceived inability to provide consistent information.

Knowledge and innovation

Participants who commented agreed that the regulator should be forward thinking and in step with society's needs and expectations. In particular, participants overwhelmingly supported the idea of the regulator actively engaging the sector in developing policy and delivering education programs.

Our conclusion and recommendation

We continue to believe that the key values we identified in our interim report underlie the creation of a supportive and effective regulatory system.

Recommendation

3. As a foundation for meeting the challenges of the future, the regulator should have four enduring values to guide it:

- **3.1 Integrity. The regulator should treat people fairly and apply the law fairly.**
- **3.2 Openness. The regulator should communicate openly about its decisions and performance.**
- **3.3 Service Excellence. The regulator should be committed to delivering consistent and timely decisions and information to its clients.**
- **3.4 Knowledge and Innovation. The regulator should have the means to continually improve its services by seeking to learn from both the things it does and does not do well. This means building partnerships and working with the sector and others toward common goals.**

Support and education

It is in the interest of the regulator that charities adopt good administrative practices and be effectively organized. This is particularly important since the primary role of the regulator is to provide confidence that publicly donated funds are being used for charitable purposes.

As we noted earlier, the federal role in providing support to the sector is limited to helping charities comply with the *Income Tax Act*. It is unclear, however, what amount and what kind of support is called for.

It is our view that it is the responsibility of any regulator to ensure that those it regulates have the information and understanding they require to comply with the laws and policies enforced by the regulator. Therefore, there is clearly an educational function that the regulator must take on. This function includes such things as making sure that the regulated are aware of the rules that govern them (such as ensuring directors are aware of financial reporting requirements) and have the assistance necessary to comply with those rules.

We expect that the regulator, whatever the institutional model chosen, will work actively to make assistance available to charities. In England and Wales, one of the most popular activities of the Charities Commission is its regular series of site visits. Commission staff visit various locations throughout the country and meet informally with charities to discuss concerns, issues or questions.

We acknowledge that Charities Directorate staff have, in the past, conducted seminars across the country, largely around the annual information return (T3010). These trips are helpful, but do not do enough to address the information needs of charities.[1]

More resources will be needed to make sure those regulated have the information they require to comply with the laws and policies enforced by the regulator. Site visits and information sessions, particularly in a country as large as Canada, will not be enough. Whether through call centres, computer technology or otherwise, the staff of the regulatory body must be available to provide answers – complete, timely and authoritative answers – on questions that are posed by the regulated.

However, we believe the regulator should not provide education on all matters of law and practice. Issues as complex as accreditation or best practices, and matters as simple as dealing with questions a charity does not want to put to its regulator, are realities in the voluntary sector. Similarly, the public may not want to put the future of a charity in jeopardy by reporting minor concerns to the regulator. There must be some place for the public and charities to go with such concerns.

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[1] In 2001, for example, 7,700 organizations requested an information session but only a third of these were able to attend one of the 66 sessions held that year. There are a number of reasons for this. The Charities Directorate has little funding to allow its staff to travel to other parts of Canada and it must rely on organizations in centrally located cities to offer space to host the sessions.

In its report, the Panel on Accountability and Governance in the Voluntary Sector wrote at considerable length on the need for, and value of, "industry associations" that help charities with issues beyond complying with the *Income Tax Act*. We agree with those observations.

A number of such organizations already exist in many of the fields in which charities operate. From the national umbrella groups to hospital associations to volunteer centres, some organizations provide ongoing support to their members. In many cases, however, these organizations cannot possibly be self-sustaining based on membership fees alone. The resources and diversity of the charitable sector in Canada – where 80% of charities have an annual income of less than $250,000 per year – make it difficult for these umbrella groups to survive financially if they are to serve all charities and not just those that can afford to pay.

The Panel on Accountability and Governance in the Voluntary Sector suggested the regulatory body should also have a nurturing function. We have reached a different conclusion. Our view should not be taken as a feeling that the nurturing role is not required. Rather we believe it is not an appropriate role for the regulator. We suggest that the nurturing function be placed in adequately resourced umbrella organizations. We also note that there are some issues with the rules regarding the charity status of such organizations. Under current administrative policy, umbrella groups are only eligible if at least 90% of their members are registered charities. Umbrella organizations also may be disqualified if they only provide support services and do not deliver charitable programs themselves.

What we heard

In reflecting on what the regulator could do to assist charities, virtually all who commented agreed that a greater emphasis should be placed on education. However, participants did not believe it was appropriate for the regulator to provide support and education on issues beyond registration and compliance with the *Income Tax Act*. Education was defined broadly by participants to include information, advice, professional development training and public awareness. Comments generally fell under six themes.

Theme 1: Education on the legislative and common law rules affecting charities

Virtually all who commented agreed that the regulator has an obligation to provide information, on an ongoing basis, about the legislative and common law rules affecting charities.

Plain language publications, public forums, education sessions, newsletters and Internet-based training modules on the law were recommended. In addition, participants felt the regulator could make better use of communications technology. They noted that most charities have an e-mail address and that information bulletins could be sent electronically by the regulator to all federally registered charities.

A number of respondents also noted that charities have an obligation to demonstrate their willingness to comply with the law. They suggested that there be an onus on charities to ensure their board members are familiar with CCRA policies. Some participants wanted incoming boards of directors to demonstrate some knowledge of the statutes governing charities by signing a certificate indicating that they are aware of their legal responsibilities under the *Income Tax Act*.

Participants agreed that the regulator should provide information about the criteria for registration, rules affecting continued eligibility and how to complete prescribed forms.

However, there was varied opinion on whether the regulator should also provide advice. Most participants felt there was a conflict in having the regulator both enforce the rules and provide advice. It was also argued that charities are uncomfortable discussing compliance concerns with the regulator for fear that disclosure may trigger an audit. Participants suggested that another body should provide guidance to voluntary organizations that need advice and support when applying for registration or when they run into difficulty with the regulator.

Theme 2: Education about what the sector is and does

Public trust was seen to be essential for charitable work to be recognized as valuable and for charities to be effective in raising funds. However, there was a general feeling that while individual Canadians may be familiar with particular charitable causes, the public understanding of the collective contribution charities make to Canadian society is fairly limited.

While the activities of national umbrella groups continue to raise the public profile of the sector, participants suggested that the regulator could help educate the public by releasing aggregate information about charities.

At the same time, the absence of a common standard within the charitable sector for allocating fundraising expenses and administration costs is seen to make it difficult for the public and other observers to interpret charities' financial statements. Some commentators noted that some organizations allocate a portion of their fundraising costs as "education" expenses (for example, when an educational pamphlet is enclosed about the work of the charity with a direct mail solicitation), while other organizations choose not to do so. Participants suggested that stronger financial reporting standards are needed within the charitable sector, not only for prospective donors looking to support a worthy charitable organization, but also for the media when it seeks to compare organizations with very different mandates, volunteer bases and financing activities.

Theme 3: Education on how to operate a charity

Assistance with governance issues within charities emerged as a major theme during our consultations. Participants commented that more education is needed on directors' obligations beyond the *Income Tax Act*. Board training was seen as essential to raising the professional capacity of individual organizations and the sector as a whole, as well as to maintaining public trust and confidence in charities. A number of those who commented felt that the federal regulator should assume responsibility for educating charities on internal board governance and accountability.

Theme 4: Education of donors

The majority of those who commented felt that with increased public concern about deceptive fundraising practices, donors want to be more informed.

However, participants warned us that most systems of regulation will not stop fraudulent groups because these groups simply will not participate in the registration process and will rely on public ignorance to deceive potential donors. They believed that public awareness campaigns, designed to educate the public about how to give wisely and the type of tactics and clues to look for, will prove more effective in stopping fraudulent organizations than excessive layers of reporting requirements.

Theme 5: Education about other rules applicable to charities

As noted earlier in this chapter, charities have responsibilities under both provincial and federal law. While the focus of this review was the federal regulatory framework as defined by the *Income Tax Act*, a number of participants commented on the need for education on directors' legal obligations under other federal laws and in other jurisdictions.

Some participants suggested that there be a one-stop clearinghouse of information on the federal, provincial and municipal rules and regulations pertaining to operating a charity. A number of participants suggested that training modules on the rules applicable to charities be developed. Others suggested that information sessions be conducted by national umbrella organizations independently or with the participation of representatives from both federal and provincial regulators.

Theme 6: Education of the regulator

Participants felt that the regulator was not always consistent in providing answers to questions. Since charity law is complex, and staff must keep up to date on recent court decisions as well as changes to administrative policies and procedures, participants suggested that regulatory staff could benefit from ongoing professional development. Other commentators questioned the ability of auditors to assess public benefit and suggested that their training is focussed too heavily on examining financial statements. Again, staff development was identified as a key issue.

Our conclusions and recommendations

The strength of feedback on the need for education has led us to conclude that this is a critical issue for charities.

Educating the sector

We believe the regulator should have responsibility for making sure charities understand the legislated and common law rules that affect them, and for providing them with assistance in completing their annual returns. We also believe the regulator should educate organizations seeking status about the criteria and process for registration.

While we acknowledge that the Charities Directorate has held education sessions in the past, these have been too few in number to meet the needs of charities. That being said, it will never be possible to visit every community in Canada that expresses an interest in holding an information session. Partnering with local community groups and sector umbrella organizations to jointly deliver information workshops, video conferencing and on-line educational modules on a variety of topics of interest to charities are only a few examples of how the regulator could work collaboratively to deliver education to the sector. We believe the regulator needs to find new, innovative ways of delivering education.

We do not believe the regulator should assume a role in educating charities on board governance and accountability. While it is in the interest of the regulator that charities adopt sound administrative practices and are effectively organized, the primary focus of the regulator is the administration of the *Income Tax Act*. This means that educational activities carried out by the federal regulator must be linked to the charity provisions of the Act. For this reason, we maintain our view that the regulator's role in providing education should be limited to registration and compliance.

Although board governance falls outside the mandate of a federal regulator, there is recognition within the Voluntary Sector Initiative that there is a broader need to be addressed. Networks have begun to emerge at the provincial and municipal level as a result of the Voluntary Sector Initiative. These groups would be logical partners to share best practices on board governance issues. National voluntary sector umbrella groups are also logical partners. Some umbrella groups are already administering voluntary programs of accreditation to enhance organizational integrity and accountability. We encourage the sector to continue to provide leadership in this area.

We also do not believe the regulator should assume responsibility for educating charities about the relevant rules in other jurisdictions. We believe the regulator should provide information on its rules and steer people to other resources for information on other federal laws affecting charities as well as provincial and municipal requirements.

Recommendations

4. **The regulator should inform and assist its clients.**
5. **The regulator should find new, innovative ways of delivering education to charities by building partnerships with the sector.**
6. **The regulator should have responsibility for educating sector organizations specifically about:**
    - **6.1 the *Income Tax Act* and common law rules affecting them;**
    - **6.2 the criteria and process for attaining and maintaining federally registered charitable status; and**
    - **6.3 how to complete their annual returns.**
7. **The regulator should not assume responsibility for educating charities about:**
    - **7.1 board governance and accountability issues (but the government and sector should explore other ways to enhance the professional capacity of individual charities and the sector as a whole to maintain public trust and confidence in the sector); or**
    - **7.2 the rules affecting charities in other jurisdictions (but should refer clients to other sources for information on other federal laws affecting charities as well as provincial and municipal requirements).**

Educating the public

We believe the regulator should assume some responsibility for educating the public about charities.

When a donor gives money to a charity, he or she has a right to see how it is spent. We believe the public should be given more information about how their donations are being put to work and what to do if they suspect their donation is not being spent properly.

However, we are concerned that the public may have difficulty interpreting charities' financial statements. Part of the problem is that there is some confusion among charities about how to record management and general administration expenditures. Some charities record expenditures on charitable work under management and general administration. Others err in the other direction and include management and general administrative items or fundraising expenditures under their charitable work. The lack of consistency in reporting among charities may encourage people to make inaccurate or invalid comparisons.

We believe the public wants assurance that most of a charity's funds are used for charitable purposes, and that administrative and fundraising expenses are kept to a reasonable level. While the regulator and the sector can provide additional information to help the public understand these statements, we believe the ideal solution would be for the accounting profession, the sector and the regulator to develop improved reporting standards for charities.

We also believe that the sector would benefit as a whole if the public were provided with more information about charities. We believe the regulator can play a limited role in educating the public by releasing aggregate statistical information such as the number of charities registered, amount of donations made, amount of charity expenditures and number of tax receipts issued. However, we believe the sector is better placed to provide public education about what charities collectively do.

Finally, it appears that Canadians are becoming increasingly concerned about how to distinguish fraudulent organizations from legitimate charities and how to ensure their donations will be used for charitable programs. We believe the regulator can play a role in educating the public about issues to consider when making a gift to charity.

Right now, the regulator can confirm whether groups are set up for charitable purposes and provide free information about their programs and finances.

Unfortunately, too few Canadians know they can go to the CCRA website to find out if a fundraiser who knocks on the door is soliciting funds for a *bona fide* charity. Our recommendation that the regulator increase its institutional presence should help the public become more aware of the fact that there is a place they can go to find out more about a charity before they give. But it is unrealistic to expect the regulator to closely monitor every charity in Canada. Donors need to be educated on how to ensure their donations are going to a reputable cause and that the money is being spent on charitable work. They also need to be encouraged to do their homework before making a gift. The sector, and especially national umbrella groups, also have an important role in educating Canadians about the issues to consider when making a gift to charity.

Recommendations

8. **The accounting profession, the sector and the regulator should work together to develop improved reporting standards of relevance to donors and charities.**
9. **The regulator should have responsibility to educate the public specifically about:**
    - **9.1 charities, by releasing aggregate information on registered charities;**
    - **9.2 issues to be aware of when giving to charity;**
    - **9.3 the regulatory process including the review process used to determine charitable status;**
    - **9.4 how to confirm the status of individual charities;**
    - **9.5 how to file a complaint about a charity; and**
    - **9.6 how to understand financial statements of charities.**

Educating the regulator

The comments received on consistency in applying the law and carrying out audits reinforced our view that more professional development of regulatory staff is needed. We address this issue and make recommendations later in this chapter under Resources.

Profile/visibility of the regulator

One of the purposes of any regulatory system is to assure the public that someone is supervising the activities of the regulated to ensure compliance with the applicable laws. While we know that Canadians have a high degree of trust in charities, we also know that they expect charities to be monitored. One of our concerns is that few Canadians know that there is any formal monitoring of charities and even fewer know who provides that monitoring.

In *Talking About Charities,* a study released in 2000 by The Muttart Foundation and the Canadian Centre for Philanthropy, 51% of the 3,900 respondents did not believe there was a body responsible for overseeing the activities of charities. Another 21% were uncertain that such a body existed. Of the 28% who believed such a body existed, only a small minority knew that it was the CCRA who had at least some such responsibility.[2]

A survey commissioned by the CCRA had similar results. The survey, conducted by Ipsos-Reid, examined public awareness, knowledge and behaviour regarding charitable donations. The vast majority of Canadians (87%) said they were aware that charities must be officially registered before they can issue tax receipts.

However, the survey findings revealed that Canadians had little knowledge about other elements of charity registration. When asked to name the organization responsible for determining whether a charity qualifies to be officially registered, two in three respondents (65%) had no idea and only one in ten (11%) correctly identified the CCRA.

The findings also suggested that Canadians desired more information about the registration of charities. Six in ten respondents (62%) believed knowing the name of the organization responsible for registering charities was very important.[3]

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[2] *Talking About Charities.* The Muttart Foundation and the Canadian Centre for Philanthropy, 2000. With the sample size in this study, results are considered to be accurate within ±0.8 percentage points, 19 times out of 20.

[3] A total of 2000 Canadian adults were surveyed in two waves of telephone interviews between December 4 and December 13, 2001. The results are considered to be accurate within ±2.2 percentage points, 19 times out of 20, with statistically reliable results for each major region of the country.

Public trust and confidence are minimized when there is limited knowledge that regulation exists. Therefore, it is important for the regulatory body to make sure that it has a public profile. Such a profile does not come only – or even primarily – from regulatory actions that are taken. There must be a determined effort by the regulator to appropriately establish its presence. Canadians must be aware that the regulator exists, what it does, and what registration as a charity does and does not mean.

What we heard

Most of those who commented agreed that trust in charities would be enhanced if donors knew there was a public institution monitoring and providing information about charities at the federal level. To ensure the regulator is more visible in the minds of donors, some participants suggested that the regulator's name be published on income tax receipts provided to donors by charities.

A few felt that the credibility of a charity is based on what they hear about an organization from local sources rather than what the regulator reports. There was also a caution voiced that the regulator may be driven, in seeking visibility, to make administrative policy changes or conduct investigations that are unwarranted. On balance, however, the comments favoured increasing the profile of the regulator to maintain public confidence and trust in charities.

Our conclusions and recommendations

We believe a requirement to publish the regulator's name on income tax receipts will give greater confidence to donors that someone is monitoring the activities of charities. However, we also believe that the regulator needs to do more to enhance its institutional presence.

Recommendations

10. **The regulator should make a determined effort to increase its national presence so the public is aware of what it does and whom to contact for information.**
11. **The regulator's name and contact information should be required on the official donation receipts that charities issue to donors.**

Resources

To instil public confidence and trust, the regulator must have the physical, financial, human and technological resources to perform the duties expected of it.

In recent years, a number of concerns have been voiced about the service standards within the Charities Directorate and, in particular, the speed with which applications are processed.

Since the announcement of the Voluntary Sector Initiative, there have been some promising signs. The Charities Directorate has received additional resources to allow it to undertake a "Future Directions" program – a modernization effort aimed at closing the gap between potential and current performance.

Yet much remains to be done. The Directorate's offices are scattered around the National Capital Region. It has several computer systems that are not able to communicate with one another. The record-keeping technology has not been updated for many years and no longer meets the management needs of the Directorate. The Directorate has little funding to allow its staff to travel to other parts of Canada.

What is of particular concern are the demands that are put on people who regulate charities, and the question of how the regulator can better attract and retain qualified staff.

One of the long-standing concerns of Directorate management, commentators and charities has been the relatively low classification level and pay of those who must decide on the registration or deregistration of charities.

In many, perhaps most, regulatory bodies, there is a firm set of laws and regulations that are enforced. Contrast that with the Charities Directorate, where there is no clear definition of what the word "charity" means.

Staff in the Directorate are asked to look at applications – many of them filed by well-meaning volunteers with little legal expertise – and determine whether the organization's purposes are charitable. In doing so, they must know charity law well and be capable of taking a wider view of the social and economic circumstances of the day. This task requires considerable skill. Staff require not only suitable background, but also substantial expertise and ongoing professional development.

Few of the people who move into the Charities Directorate do so to make it a career. While staff turnover is common across government, it is particularly harmful for the client groups involved – including those charities providing services to marginalized groups and vulnerable citizens.

What we heard

The issue of resources was identified as the single, most important factor in determining the success of regulatory reform.

Those participating in the consultation agreed that the regulator must have sufficient physical, financial, human and technological resources to perform the duties expected of it. A few stated that many of the problems being examined by the Table could have been avoided if the Charities Directorate had not been chronically underfunded since its inception. In addition, the observation was made that insufficient funding has contributed to selective enforcement and more resources are needed for monitoring ongoing compliance to instil donor confidence.

A number of cautions were voiced about raising operational expectations without a strong commitment for funding and some doubted whether additional dollars would be made available to implement our recommendations. Participants acknowledged that new resources had been given to the Charities Directorate since the creation of the Table. They noted that the level of service had improved dramatically over the past two years. However, they feared that, with the end of our mandate, the situation would revert to the less-than-acceptable past.

Our conclusions and recommendation

We continue to believe in the need for improved funding of the regulator.

We acknowledge the significant new resources that were allocated to the Charities Directorate to allow it to undertake the CCRA's Future Directions Initiative. We also acknowledge – as have other commentators – that there have been demonstrable results from that initiative. Those results have helped ensure faster and better service by introducing improved management models into the Directorate.

We do not criticize those who have served in the Directorate in the past. They did as much as they could, given the resources that were made available to them.

We are proposing that the workload increase even beyond that which has been achieved through Future Directions. Requirements such as the publication of reasons, the development of new informational material and significant additions to technology will all require resources in the form of people and equipment. Without these resources, the improvements will not take place, and there will be continuing demand for a different model of regulation.

We had neither the time nor the expertise to cost out all of the improvements that we think are required. As Ministers consider our recommendations, they will require such detailed financial information from the public service. However, it is clear to us that whatever regulatory model is chosen, additional resources are going to be required in a number of areas. The two most significant areas are described below.

Staffing

In our interim report, we noted the concerns, raised internally and externally, about the turnover of staff within the Charities Directorate. We obviously do not want to hamper the ability of any public servant to pursue a suitable career path. At the same time, we believe that there should be opportunities for reasonable compensation, development and promotion within the regulator itself as an incentive to people to remain and become expert in what can be a difficult area of law to administer.

The issues go beyond an examination of classification and pay scales. Our recommendations will add significantly to the workload of the regulator. It is critical that the staff complement match the workload we are proposing.

In addition to an examination of the classification levels and pay scales within the regulator, we believe it would be useful for resources to be made available for travel and professional development.

Currently, there is little money available to allow Charities Directorate staff to move about the country. Funding for the information sessions that are held is insufficient to meet demand. There are few opportunities for the regulator's staff to meet with individual charities. This has led to a feeling among some that the regulator is "out of touch" with what happens "in the real world." While we see it as likely that decision-making on charities will remain centralized, we believe there should be resources available to allow more interaction between charities and the regulator.

Professional development has proven, in any number of fields, to be an incentive for people to remain with an employer, and has resulted in increased productivity. We believe additional resources are needed to allow staff to attend conferences and seminars. We would go further and encourage consideration of such things as staff exchanges and secondments. We believe that there is also the potential for improved service if the regulator had the funds necessary to host staff seminars, delivered by people from the charitable sector, explaining the way charities operate across the country.

Technology

Throughout our report, we call for increased use of technology to make information available more quickly and readily than is currently possible. These changes will require resources probably more significant than might originally be considered. For example, the development of the new annual information return (T3010) consumed about half of the amount allocated for the entire regulatory reform exercise, with most of that attributable to the development of the information-technology systems needed to support the processing of information reported on the new form. Future developments, including the possibilities of allowing charities to file returns electronically, will also require resources.

While all of these will be welcome and necessary changes, one must not lose sight of the day-to-day information-technology needs of the regulator. As previously noted, the Charities Directorate currently uses several different information systems that are not compatible. These systems were designed in a different era and no longer provide the type or level of information necessary to allow for appropriate management.

Whatever the future regulatory body looks like – whether it remains within CCRA or some other model is chosen – it will require the resources necessary for a major overhaul of existing systems. The Table encourages ministers to make such work a priority.

As a final conclusion, we want to make the point that investment in the regulator will benefit government, the sector and society as a whole. For government, the effectiveness of fiscal policy will be maintained by ensuring that the tax expenditure associated with charitable donations supports true charitable activity. For the sector, there will be assurance that charities of all stripes operate on a level playing field with each other, that donation dollars will not be siphoned off to non-legitimate purposes, and that the public confidence which is vital to their continued operation is maintained and enhanced. For society as a whole, there is greater certainty that their donations and tax dollars serve the intended purpose, and that the myriad of voluntary services they may depend upon will be there when needed.

Recommendation

12. The regulator should be appropriately resourced for the tasks which it must undertake, and specifically:

12.1 a compensation study should be undertaken to ensure that classifications and levels of pay reflect the requirements of the job;

12.2 senior management within the regulator should examine methods to encourage public servants to remain within the regulatory body and develop additional levels of expertise;

12.3 resources should be made available for additional travel by the regulator's staff to events, including information sessions, conferences and seminars;

12.4 senior management within the regulator should introduce professional-development opportunities such as secondments and exchanges with charities;

12.5 the staff complement should be examined in light of the increased workload that will result from the Table's recommendations; and

12.6 priority should be placed on development of information-technology systems that will meet the current and future needs of the regulator.

Legal principles and powers to determine charitable status

A number of commentators have suggested the CCRA may be too conservative in its interpretation of the law and, in particular, in its approach to registrations. We have examined this issue and found that the CCRA approves applications for registration at a rate that is comparable to that of other jurisdictions, including England and Wales and the United States. However, similar complaints have been voiced in those jurisdictions as well.

One reason for being cautious when registering charities may be the fact that registrations are based almost exclusively on materials submitted by the applicant. There is no systematic process to identify and correct wrongful registrations. Also, there is little ongoing regulatory supervision once the CCRA makes a decision. The process really stops to a large extent at the decision to register.

The definition of charity has also provoked much discussion. Some argue that there should be a legislative definition of charity. The courts have said that they are ill equipped to make social policy and that those decisions should be made by Parliament or by elected officials. The Panel on Accountability and Governance in the Voluntary Sector proposed such a solution and recommended that Parliament reconsider the definition every 10 years.

The Supreme Court of Canada, in *Vancouver Society of Immigrant and Visible Minority Women*,[4] also suggested that Parliament address this issue. However, others in the charitable sector oppose a legislated definition, saying it would create too "rigid" a system and that it would lead to a situation where only "politically palatable" organizations would obtain registration.

Concerns have also been expressed about the current approach to political activities on the part of charities. The law states that a charity cannot have a political purpose or be engaged in partisan political activities. Engaging in political activities is allowed to the extent that those activities are non-partisan and a very minor part of the activities of a charity. This is a broad rule that has created some confusion about what is and is not permitted.[5]

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[4] *Vancouver Society of Immigrant and Visible Minority Women v. MNR* [1999] 1 S.C.R.

[5] The treatment of political activities was not part of the Table's mandate. However, the Table did receive comments from participants on this issue during the consultation. Finance Canada and the CCRA are reviewing the administrative and legislative issues related to political activities and charitable status. They have met with representatives from the sector and a number of government departments to discuss concerns in this area. Following these discussions, the CCRA released draft guidelines on allowable political activities in an attempt to clarify the rules surrounding political activities.

Many of these concerns are not matters of institutional reform, but rather how the regulator applies and interprets the law. The Directorate, acting on the same basis as the courts, works within and interprets the legal rules that determine whether an organization is charitable. These are mainly laid down in decisions of the courts on particular cases rather than set out in Acts of Parliament. Because there is not a precise definition of charity, the Charities Directorate must look closely at those purposes that have already been recognized as charitable.

There may not always appear to be any direct court precedent. In such cases, the Directorate then has to decide (using fundamental legal principles) whether efforts to address problems raised by changing social needs are legally charitable in the same sense as those already accepted as charitable. In reviewing applications, the Directorate must consider whether the courts would or would not allow a particular organization to be recognized as charitable. The Directorate does not have the power to change the law beyond the flexibility that is implied in the decisions of the courts. Any changes beyond that would need to be made by the courts or by Parliament.

While in some cases a sufficiently close analogy may be found, in others an analogy may only be found by following the broad principles laid down by the courts. Unfortunately, the small number of court cases dealing with what is or is not charitable in Canada does not give the Directorate the guidance it would have if a larger number of legal precedents were available.

What we heard

Virtually all who commented asked for clarification about our assertion that the regulator has no capacity to set precedents. It was argued that "making the law" can happen administratively, and that the Charities Directorate is already establishing what is charitable through its decisions to register organizations since positive decisions are not appealed. In this way, they suggested, the Directorate is administratively expanding the boundaries of what is charitable, organization by organization.

There was some criticism of how the current regulator applies and interprets the law. Many commentators would like to see a regulator more actively pushing the boundaries of what should be charitable as supported by reasoned analysis and an awareness of changing social conditions. However, the point was made that the regulator is in a difficult position since the courts are restrained by previous decisions and are reluctant to expand on the traditional heads of charity, even in light of changing needs and circumstances, without further direction from Parliament. The resulting administrative approval system is not perceived as working fairly or consistently.

Our conclusions and recommendations

To clarify, the regulator does not have any inherent authority outside the *Income Tax Act* to interpret what is charitable, in contrast to superior courts. However, the regulator has the authority to draw reasonable analogies in determining what should be registered. The approach of reasoning by analogy has been outlined by the Supreme Court of Canada in *Vancouver Society of Immigrant and Visible Minority Women*. Using this approach, the courts have endeavoured to keep charity law evolving as new social needs arise or old ones become obsolete. However, in the absence of clearly defined principles for determining whether a particular purpose is charitable, the courts, and perhaps also administrative decision makers who rely on judicial decisions, may become too narrowly tied to existing categories.

We believe that an effective regulator is one that is both enforcing the law and interpreting the law in light of changing social conditions through the use of analogy.

However, we acknowledge that those responsible for making registration decisions need clear policy guidelines on the nature and extent of their authority under the *Income Tax Act* to recognize new purposes. In addition, improved training programs for examiners (both upon their hiring and on a continual basis) are needed. Finally, improved research capabilities for decision makers, such as electronic access to previous decisions of both the regulator and the courts, would allow examiners to better identify similar fact situations and more consistently interpret the law.

Recommendations

13. **Clear policy guidelines should be developed on the nature and extent of the regulator's authority to identify new charitable purposes that flow from the application of the common law to organizations under the *Income Tax Act*.**
14. **The regulator should enhance the training examiners receive upon entry and on a continual basis.**
15. **The regulator should introduce better research tools for decision makers, such as electronic access to a searchable database on previous decisions of both the regulator and the courts, to allow examiners to better identify similar fact situations and more consistently interpret the law.**

Coordinated regulation

Regulation of charities is shared between the federal, provincial and territorial governments.[6] Constitutionally, the provinces have been given the authority to make laws regarding the "establishment, maintenance, and management of charities in and for the Province" by the *Constitution Act, 1867*.[7]

The federal government's regulatory involvement is premised currently on its authority to make rules regarding income taxes.[8] Because donations to registered charities create a tax credit, the federal government, through the *Income Tax Act*, has developed a series of rules regarding the operation of charities.

Among the powers exercised by the federal government, a significant one for the sector is the power to determine which organizations can be registered as charities under the *Income Tax Act*. Supervision of the sector at the federal level is focused on making sure organizations that are federally registered as charities under the *Income Tax Act* comply with the Act and continue to be entitled to favourable tax treatment.

In examining new institutional arrangements, we recognize the important role that provinces play in regulating the charitable sector. While our review focused on the situation at the federal level, we also examined areas where both levels of government are involved and found instances where regulation may not be consistent across jurisdictions. Several examples of this situation emerged in our analysis:

- An organization that is considered to be a charity under provincial law may not qualify for registration as a charity under the *Income Tax Act* and a federally registered charity may not be considered charitable for all purposes (e.g., gaming) in a particular province.
- The provinces have involved themselves in the regulation of charities to different degrees, ranging from virtually no regulation to a significant supervisory authority.
- The *Income Tax Act* does not define the term "gift" and organizations in Quebec are entitled to the application of the Civil Code in determining whether or not a contribution is a gift. This means "gift" can have a different meaning in different parts of the country.[9]

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[6] Some municipalities have enacted bylaws that also can impact the charitable sector, ranging from taxation of property to regulation of fundraising.

[7] Subsection 92(7).

[8] This is not to imply that the *Income Tax Act* is the only federal legislation that affects charities. See footnote 2 in Chapter 1.

[9] However, in December 2002, a technical amendment to the *Income Tax Act* proposed to define the "eligible amount of a gift" for tax purposes.

- It is not clear who has jurisdiction over charities that are not "in and for the Province" such as a national organization or an organization that operates in more than one province or on the Internet.

Multiple regulatory structures and rules can create an additional compliance burden on charities. They can also negatively affect public confidence by creating confusion about who is regulating the sector. There is potential for poor co-ordination and overlapping of duties.

A number of possibilities have been suggested. One option is to establish a national regulatory body through which federal, provincial and territorial governments could better co-ordinate the regulation of charities. Another possibility is for some kind of agreement among governments, which would take into consideration specific needs of individual provinces and territories.

What we heard

Virtually all who commented felt that split jurisdiction over the charitable sector between the federal government (through the tax system) and the provinces (over charities in the province) is a source of confusion for charities and the public.

Participants also noted that regulatory overlap creates confusion among donors and the general public, about what level of government is responsible for what aspect of supervision. There was overwhelming agreement that both levels of government need to find ways to work more closely together.

Some people noted that various provinces house responsibility for charities in different departments. In some, the Attorney-General has that responsibility. In other cases, it may be the Minister of Finance or the Minister of Government Services or some other minister. This means that charity regulation does not get on the agenda of federal-provincial ministers because no such gathering brings together the disparate ministers responsible for the issue. Overwhelming support was given to the idea of establishing a mechanism to ensure ongoing communication between different levels of government.

Provincial government representatives noted that the *Income Tax Act* and freedom of information legislation limit the meaningful sharing of information between the provinces and the federal regulator until a case is brought before the courts. The inability to share information about investigations of complaints both during and after investigations was seen to result in a duplication of work for regulators and added burdens for the charitable sector.[10]

Many participants also noted that most provinces do not have the resources to monitor or enforce compliance and that a combined effort would be more efficient. In addition, there is no mechanism that allows the provinces and the CCRA to consult formally with one another to ensure a consistent approach with respect to the interpretation of the law. This can result in inconsistencies in the way regulators interpret and apply the common law, and can lead to situations where an organization is considered charitable under one jurisdiction but not the other. Some suggested that common forms and standard objects be developed for use by provincial and federal regulators, to avoid duplication of effort and reduce administrative costs to charities.[11]

A number of those who commented also stated the duplication of regulation and the lack of consistency across jurisdictions is a problem at the municipal level as well. One umbrella organization noted that there has been some confusion regarding the treatment of religious charities in some municipalities, and this has affected their eligibility for municipal grants. Similarly, we heard that municipalities use widely varying criteria in deciding which charities should benefit from property-tax exemption.

Some concern was expressed that there would be no political will to tackle coordination of regulation once the Voluntary Sector Initiative is concluded.

[10] One case brought to the attention of the Table during the consultations illustrates the potential of greater coordination between jurisdictions. A provincial regulator was involved in investigating a charity where there were allegations that all of the charity's funds were being used for fundraising and administration expenses and that no funds were used for the charitable objects. The CCRA had received a complaint about the same charitable organization and had conducted an audit. The charitable organization signed a release allowing the provincial regulator to obtain a copy of the CCRA's audit file and for the offices to exchange information about the charity. The provincial regulator was able to use the CCRA's findings in its court application. At court, the provincial regulator was successful in obtaining orders requiring the directors of the charity to pay back funds that they had improperly received. In addition, those directors were prohibited from being involved in the running of other charitable organizations. This example shows how valuable it was to use the information obtained by CCRA in the provincial proceeding and to discuss the issues during the investigation. In this case, provincial trust law provided a mechanism to recover misapplied funds, and the operation of federal law resulted in the charity being deregistered.

[11] One example of coordination of regulation is the simplified incorporation process used in Ontario. In 1999, the Office of the Public Guardian and Trustee, in cooperation with the Ministry of Consumer and Business Services, developed a streamlined process for the incorporation of Ontario charities. The process included the development of standard object clauses, in consultation with the Charities Directorate, for use by proposed charitable corporations. The object clauses were accepted by the CCRA and are in use today. This process simplified the incorporation process for Ontario charities and made it easier for them to become a registered charity under the *Income Tax Act*.

Our conclusions and recommendations

There is benefit in exploring opportunities to develop a better coordinated system of regulation.

Charities and their beneficiaries are not well served when faced with multiple levels of sometimes conflicting regulation. A more consistent approach to the way regulators interpret and apply the law is needed.

Nor is the public well served when they do not know which level of government is responsible for monitoring various aspects of a charity's operations. The public interest is not adequately protected when regulators cannot share information about investigations that have uncovered serious issues of non-compliance or public fraud.

The comments received indicate that the sector would like the federal government to take a leadership role in opening up a dialogue on this issue. We believe there is serious merit in the suggestion that a forum be created to discuss the challenges and opportunities of coordinated regulation.

Recommendations

16. **The regulator should enter into discussions with the provinces to explore opportunities to reassure the public that charities are being effectively regulated and to reduce any conflicting demands and duplicative administrative burdens on charities.**
17. **Legislative amendments should be made to allow the regulator to share information with the relevant provincial authorities and with other federal regulatory agencies.**
18. **Provincial governments should be encouraged to make appropriate changes to their legislation to provide better coordination of compliance programs.**
19. **A forum should be established to allow regulators to come together to discuss issues of mutual interest and concern.**
20. **The appropriate federal minister should play a lead role in convening the first gathering of charity regulators.**

The broader voluntary sector

The Voluntary Sector Initiative was designed to look at more than just registered charities. It was designed to benefit voluntary-sector organizations, whether incorporated or not, whether a registered charity or not-for-profit organization that, for whatever reason, is not registered as a charity.

The challenge of developing a regulatory system that encompasses all charities and not-for-profit organizations, however, is a formidable task.

For example, some not-for-profit organizations could be registered as charities except for their political activities.[12] In other cases, an organization may have no wish to accept donations for tax-credit purposes, but is clearly serving a public benefit. In still other cases, a group of professionals may band together for mutual benefit. Their interest, while private, is nonetheless acceptable for consideration as a not-for-profit organization. Comparing a condominium association with an organization whose members organize walkathons to raise funds for wheelchairs is difficult. Designing a common regulatory system borders on the impossible, at least within the time and resources available to us.

As a result, we focused our attention on issues that pertain to registered charities. However, we believe there may be merit in exploring this issue further.

What we heard

Virtually all who commented agreed that, given the time and resources available, it made sense to focus the review exclusively on federally registered charities. On the other hand, many noted that the public does not distinguish between charities and the rest of the non-profit sector, and, for this reason, accountability should be extended to the broader non-profit sector. In a written brief, one organization argued that the definition of a non-profit organization in section 149(1)(l) of the *Income Tax Act* is dysfunctional and no longer necessary. Another suggested that if regulation could not be extended to include non-profit organizations, efforts should be made to develop standards/codes of good practice that the entire sector could adopt.

Our conclusion and recommendation

Given that a more thorough review of this issue was not possible, we recommend that further study be undertaken.

Recommendation

21. **The government and the sector should undertake a thorough review of regulatory issues affecting the broader voluntary sector.**

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[12] The Table does not comment on whether the existing rules related to political activities are appropriate or not. Indeed, it accepts that some legal advisors to charities advise their clients to establish both a charity and a not-for-profit as a matter of course.

Administrative mechanisms

We have explored a number of administrative mechanisms through which the characteristics of an ideal regulator and the critical success factors identified above could be supported. These mechanisms include:

- public consultation on new policies;
- annual reporting by the regulator; and
- implementing an advisory group to the minister.

Public consultation

The Charities Directorate has, in the past, often consulted with interested stakeholders prior to introducing new policies. However, we believe more could be done to identify areas of mutual concern and create more opportunities for dialogue and feedback, particularly in exploring the boundaries of what is and is not charitable. The regulator, for example, could broaden public input into the administration of charity law through widely advertised consultations. Ongoing public consultation would also enable the regulator to identify new trends, contribute to available knowledge about the sector, gather intelligence on areas of concern and plan how to monitor Canadian charities with the input of those most affected.

What we heard

We received few comments on the need for more public consultation. However, it was evident from comments we received on other subjects that the sector would appreciate the opportunity to contribute to administrative policy development. In addition, some provincial government representatives called for greater communication and discussion on applications for charitable status. By discussing problematic charitable objects or applicants whose purposes are questionable, a more consistent approach could be adopted by the various regulatory authorities.

Our conclusions and recommendations

We believe that policy dialogue is essential to ensure the regulator's policies benefit from the sector's experience, expertise, knowledge and ideas.

We acknowledge the Charities Directorate has conducted public consultations prior to introducing new policies. This has enabled the sector to bring forward its views and resulted, we believe, in the development of better policy. However, we feel more could be done to engage the sector in regular dialogue so that concerns could be communicated at various stages of the policy development process, rather than only after policy has been drafted.

To do this, the regulator should draw on the full range of methods available including written consultations, opinion surveys, focus groups, user panels, meetings and various Internet-based approaches.

Recommendations

22. **The regulator should develop ways to engage the sector in regular dialogue to hear concerns and issues identified by voluntary sector organizations.**
23. **The regulator should draw on the full range of methods to engage in a dialogue with the voluntary sector at the various stages of the policy development process.**
24. **The regulator should continue to consult on its draft policies.**
25. **The regulator should use its website to provide information about current consultations on draft policies, recently closed consultations, the results of previously held consultations, and consultations scheduled to begin.**
26. **The regulator should conduct its consultations in accordance with the Voluntary Sector Initiative's Code of Good Practice on Policy Dialogue.**

Annual reporting

Annual reporting could allow the regulator to communicate to stakeholders on its activities and performance. Such reporting could include:

- statistical information on charity applications, denials, registrations, trends, etc.
- aggregate results of audits and compliance measures,
- extent of support provided to charities to assist them with compliance,
- outreach and communication activities, and
- levels of expenditure.

Other more general information such as trends in the type of organizations seeking registered status and reasons for deregistration could also be summarized. An annual report may also increase the profile of the regulator with the general public.

What we heard

Those who commented supported the introduction of an annual report to provide aggregate statistical information about the regulator's performance and activities, including, for example, the number of applications for registered status received, number of charities registered, number of applications rejected or withdrawn and types of sanctions imposed. In addition, commentators noted that one of the weaknesses of the charitable sector is that so few members of the public are aware of its positive impact on Canadian society and communities. In a written submission, one national umbrella organization argued that trust in the sector would be enhanced if the public were provided with more information about the sector on a consistent basis. They suggested that information be provided on the number of charities registered, funds raised, how much charities spend and how money is raised.

Our conclusions and recommendation

We believe an annual report is needed and agree that it should include aggregate information about registered charities. Other suggestions on the information the annual report should contain are made in the chapters that follow.

Recommendation

27. The regulator should be required to publish an annual report to the public on its performance and activities, and the report should include aggregate information about registered charities.

Ministerial advisory group

A charities advisory group with membership from the voluntary sector and government departments could advise the government on improving the regulator's policy framework. This body would report to a minister and would oversee a staff team who would be responsible for carrying out the advisory group's work plan.

The advisory group would play a key role in encouraging the free exchange of ideas and promoting open and constructive contact between the regulator and the regulated. Its guidance would help senior regulatory officials become sensitive to developments in the sector and make sure that all key internal and external groups are involved in policy development.

The members of the advisory group could represent a wide range of interests and multiple viewpoints, including:

- the voluntary sector;
- regions;
- the general public;
- allied professionals; and
- a range of government departments with a policy interest in the regulatory affairs of charities, including the Department of Justice Canada, Canadian Heritage, Finance Canada, Health Canada and Industry Canada.

Because government officials have a conflict of interest between their duties to ministers and their responsibilities as members of advisory bodies, we suggest they sit in an ex-officio capacity – meaning they would have no decision-making role. The ministers of the relevant departments would have the authority to appoint employees to the advisory group. The government would appoint non-governmental members of the charities advisory group.

This consultative body would meet on a periodic basis and would have a number of responsibilities and levels of involvement:

Administrative policy advice. The primary role of the advisory group would be to provide administrative policy advice on such issues as mechanisms for achieving compliance, the interpretation of the law on charitable status and other areas under the administrative authority of the regulator.

The charitable sector is vast in terms of both numbers and operational practices. This body would provide those involved in regulation with a "touchstone" against which they can assess proposed policy initiatives, test new ideas and confirm the service required and delivered. As such, it could play a key role in the regulator's cycle of planning, monitoring, evaluating and reporting of results through a minister to Parliament and citizens.

The advisory group would also have the authority to review, in aggregate, registration and compliance decisions made by the regulator and provide comment on trends and the quality of decisions being made.

Communication. To promote open communication and transparency, the advisory group would report on its activities, initiatives and findings as part of the regulator's annual reporting process.

Consultation. The advisory group would take a lead role in assisting the regulator with prioritizing among various initiatives and ensuring development is timely, policy is written in a clear, concise manner and consultation begins early in the development cycle. The advisory group would assist the regulator in exploring issues of concern and increase the capacity for institutional learning.

We considered whether this body should be asked to review and provide direction on specific cases before a final decision is made by the regulator and, in this way, create an opportunity to resolve cases before turning to the courts. In our Interim Report, we rejected this idea. It was our view that access to a fair and impartial review process was a more appropriate mechanism through which to resolve disputes and seek guidance. For a full discussion of our proposals for reform of the appeal process, please see Chapter 5.

An advisory committee was created within the Charities Directorate in the mid-1980s, but it did not meet regularly, was not adequately funded and no longer exists. Its purpose was to provide the Charities Directorate with administrative policy advice and act as a sounding board for new communications initiatives. Representatives were selected from a cross-section of charities, sector umbrella groups, government departments and charity law specialists. We see a significantly expanded role for the charities advisory group. However, experience of the past illustrates the requirement that this advisory group, if implemented, be adequately funded and supported. To accomplish the tasks outlined for the charities advisory group, there is a need for dedicated staff support.

What we heard

Participants overwhelmingly supported our proposal to establish a ministerial advisory group. There was also general agreement that the advisory group should have broad representation from the voluntary sector, national umbrella organizations, lawyers and other allied professionals.

A number of suggestions were made on the functions of the advisory group. A few respondents felt it should have regulatory decision-making powers. It was suggested in a number of cities, for example, that the group be involved in internal reconsideration of denied applications for registration (see Chapter 5). Others felt the advisory group should decide which cases merit funding, should the government decide to establish an appeal fund.

Our conclusions and recommendation

We believe a sector advisory body would provide the regulator with the opportunity to test its strategies and ideas with representatives from its client groups. This group could also help the regulator to disseminate draft policy more widely within the sector and provide a sector lens to the development and implementation of future regulatory policy.

However, we are not convinced that the advisory group should be involved in the actual decision making involved in internal reconsideration or in selecting cases for support by the appeal fund.

Various additional roles have been given to the advisory group in the chapters that follow.

Recommendation

28. A ministerial advisory group should be established to provide administrative policy advice to the minister responsible for the regulator, and

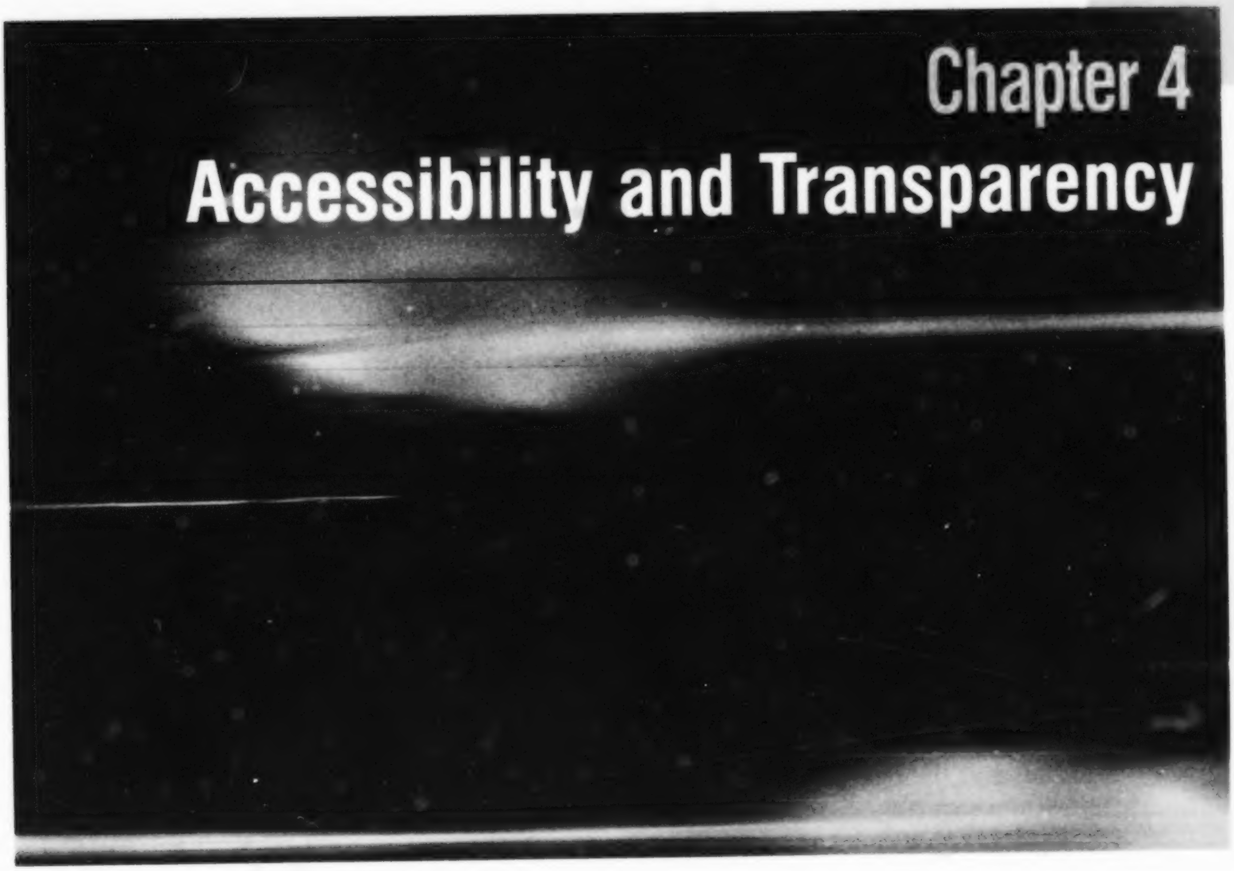
28.1 the advisory group should consist of appointees with a broad range of experience and knowledge;

28.2 funding support should be provided to reimburse appointees for the direct costs associated with their participation on the advisory group; and

28.3 sufficient funding should be provided to allow the group to carry out the tasks assigned to it.

Chapter 4

Accessibility and Transparency



Chapter 4

Accessibility and Transparency

Introduction

The issue of transparency received considerable attention from the Table on Improving the Regulatory Framework. In its contribution to the *Working Together* report (1999), it defined transparency as covering informing, reporting, responding to requests for information, and conducting regulatory affairs in a manner that can be easily observed and understood. Accessibility is a related concept and refers to making information available to others. In the context of this chapter, it refers specifically to the regulator making available to the public the information it holds about charities.

Over the last five years, the amount of information that the Charities Directorate can release about a charity has increased significantly. But it is still limited. The *Income Tax Act* has, for good reason, a bias that information provided by a taxpayer should remain confidential. Even though charities (and not-for-profit organizations that are not registered charities) do not pay taxes, they are considered "taxpayers" under the Act. Therefore, most information about them was, in the past, considered confidential.

Until a legislative change in 1998, the Charities Directorate could confirm that an agency is or was a registered charity, the location of the charity, its registration number, and the date of registration. Also, the Directorate could release the information provided by charities in the public portion of their annual information return (T3010) and, with the charity's permission, could make its annual financial statements available on request. If a charity's registration had been revoked, the revocation date could also be released.

As a result of the 1998 amendment, the Charities Directorate now may, at the request of any individual, release the following additional information about a registered charity:

- the charity's governing documents, including its statement of purpose;
- information provided on the application form;
- names of the charity's directors and the periods during which they were directors;
- the letter notifying an organization of its registration as a charity, including any warnings or conditions; and
- the letter sent by or on behalf of the Minister to a charity revoking its registration, including the reasons.

Despite this amendment, there is still much information held by the Charities Directorate that cannot be or is not released, including information relating to an application for charitable registration that is denied. People also cannot find out whether a charity has been audited or the results of that audit, unless the charity is deregistered. Information about the Directorate's policies and operational guidance to its employees is not published.[1] In general, even with the amendment of 1998, there is not enough information available to allow the public – including other charities – to assess the performance of the Charities Directorate.

The current rules raise a significant issue – how to balance the privacy that charities should enjoy when dealing with the regulator against the need for transparency of the regulator's policies, procedures and decisions.

We considered what information should be readily available to the public, either on request or through a mandated requirement that it be published. At the same time, we also considered the impact of the wholesale release of information about a charity. For example, if a charity is about to be audited, should that fact be known? Would it not help an unscrupulous organization to avoid detection? Would it not damage the public's trust in a charity, even if it were eventually found to be wholly in compliance with the law?

In reaching our recommendations on the release of information, we looked at the "life cycle" of a charity and considered what information the regulator gathers at each stage. We then examined whether that information should be released or kept confidential. We have come up with a series of recommendations covering the following documents:

- documents related to an application;
- documents related to a compliance action;
- documents on a charity's files that do not relate to either applying or complying; and
- other information that would promote accessibility and transparency such as the policies and procedures of the regulator and previous decisions of the court and the regulator.

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[1] In November 2002, the Directorate started placing its policies on its website.

Documents related to an application

Before a decision has been made

Normally, the first time the regulator becomes aware of an organization is when it applies for registration as a charity. There is some disagreement as to whether the regulator should, before a decision is made, release the fact that an organization has applied for registration. The *Working Together* report said this information should be available. With respect, we disagree.

We do not see the benefit of advertising that a specific organization has applied for charitable status. It is unlikely that individuals will be able to provide information that is relevant in determining whether the applicant's proposed purposes are charitable or not. On the other hand, we see room for significant mischief. Individuals or organizations that are opposed to a particular group's beliefs, or who might see the applicant as a potential competitor, could raise objections to the application. If an examiner were to receive and consider an objection, then procedural rules would have to be established to allow the applicant to examine the objection and to submit additional material. We believe that this would create a procedural logjam.

If someone believes that there are valid objections to the registration of a particular charity, the regulator could use that information as part of its compliance program. After considering the objection, it could decide whether or not closer scrutiny must be given to the newly registered charity.

Therefore, we propose that no information should be made available about an applicant until the regulator decides on the application.

After a decision has been made

By contrast, we believe that significantly more information should be available about the regulator's decision after it is made.

The first information that should be available is the reasons for the regulator's decision. As a general rule, we believe that reasons should be given, and should be publicly available, for every registration decision. The reasons do not always have to be an in-depth explanation. If, for example, a new church is registered, the regulator need only say that its decision was based on a conclusion that the applicant falls into the "advancement of religion" category. On the other hand, if the applicant's charitable purpose is a novel one or represents a new interpretation of a charitable purpose, then the purposes of the organization should be given, as well as the category under which it has been registered. Also, an explanation of the reasoning that led to its registration should be provided.

If an application is denied, the reasons should always be more complete and should include the organization's name. This may take the form of releasing the Administrative Fairness Letter in which the regulator states its preliminary determination and the reasons, or it may be in some other format. If the organization is appealing the decision, any release of information should note this fact.

We believe that the reasons for a decision, a critically important part of the transparency issue, should be **actively released**. The regulator should not wait until it is asked for a list of denials or reasons, but should actively publish its decisions on its website. In the case of approvals, this may be linked to the charity's name on the register. In the case of denials, some other part of the website can be used.

We recognize that in a small number of cases, provisions of the federal *Privacy Act* may create a barrier to full release of information about a denied application. In those cases, the regulator should withhold as little information as possible. The *Privacy Act* should be used with precision.

While the regulator should actively publish the decisions and reasons, further information about the application should **only be available on request.** We would maintain the current provisions that allow for the public portions of the application for registration to be made available to anyone requesting them. We would also allow that same information for organizations that do not obtain registration to be available on request. Application files can be voluminous, and contain numerous references that would have to be erased before public release in order to comply with the provisions of the *Privacy Act.* We believe there is insufficient justification for this additional work, in that there would be adequate information available to judge the regulatory authority's decision making if our recommendations are adopted.

Other information on an application file should **remain available only to the applicant**. This information includes communications between the applicant and regulator, internal memos prepared by the regulator's staff, research materials gathered by the regulator, and communications between the regulator and third parties.

The regulator can, from time to time, expect to seek legal opinions about particular issues. These opinions are privileged and should not be disclosed to the applicant or the public.

What we heard

During the consultations, a substantial majority of the speakers supported our proposal against disclosing the names of applicants before a decision is reached on their applications.

On releasing information on denied applications, opinion was divided. A few spoke against releasing any information, including reasons for the denial. A slight majority favoured identifying denied applicants in posting reasons for the denial on the regulator's website. Giving a detailed explanation of why an organization was denied would allow enhanced scrutiny of the regulator's decisions and enable others to learn about what is required to obtain registration. However, a significant number, while wanting reasons for denials to be given, also wanted the identity of denied applicants to be protected. They felt sufficient accountability could be achieved by actively publishing just the reasons for the denial. Naming the organization was unnecessary and could prove pointlessly damaging.

In addition to actively publishing information about registration decisions, we also proposed that the same documents that are currently available on request for a registered applicant should also be available for denied applicants. Opinion on this proposal was also divided.

Our conclusions and recommendations

We confirm our original conclusion that no information about an applicant organization should be available to the public while the application is still in process. Also, we confirm our original conclusion that once the regulator makes a positive decision on an application, it should publish the names of newly registered charities on its website, along with the reasons for the decision. These reasons need to be detailed when the application raises unusual or novel features, but for routine applications it would be sufficient to identify the charitable category into which the applicant falls.

Given the variety of opinions expressed in the consultations, we reconsidered how denied applications should be treated. On the one hand, we believe that explaining why applications fail is a key element of regulatory transparency, and that in many cases a proper accounting cannot be given if the identity of the applicant has to be withheld. On the other hand, we acknowledge that at least some unsuccessful applicants might not wish to have their identity made known.

We confirm our original proposal for a full release of reasons for a denial, including the name of the organization. However, we would allow organizations that do not wish to disclose this information to formally withdraw their applications after the regulator has issued an Administrative Fairness Letter (for a description of the current registration process, please see Chapter 2). If they withdraw, nothing about their application would be in the public domain (beyond the regulator providing the number of such withdrawals and any pertinent observations in its annual report). To avoid giving an impression of encouraging organizations to withdraw, the regulator should inform them of this option early in the registration process, before reaching the stage of issuing an Administrative Fairness Letter.

We also confirm our original proposal that the same information that is currently available on request for successful applicants should also be available on applicants that are denied registration. This information would not be available if an applicant withdraws its application.

Currently, about 20% of applications are neither approved nor denied. We believe this is too large a number to leave unaccounted for. We thus wish to add to our original proposals that if an applicant does not respond to a request for further information within 90 days, the application should be denied on the basis that it is an incomplete application. Further, if an applicant does not respond within 90 days to an Administrative Fairness Letter, the application should be denied for the reasons stated in the Letter. In both cases, we suggest an applicant could ask the regulatory authority for reasonable extensions to the 90-day period where it needs more time to respond.

Recommendations

29. **The identity of applicant organizations should remain confidential until the regulator either accepts or denies the application.**
30. **The regulator should publish on its website reasons for all its decisions on applications.**
31. **The same documents that the *Income Tax Act* allows to be disclosed for registered charities should also be available on request for organizations that have been denied registered status, plus the letter setting out the reasons for the denial.**
32. **Organizations should be made aware early in the registration process that they can withdraw their application after receiving an Administrative Fairness Letter, and that, if they choose this option, then no information about their application will be released.**
33. **The regulator should establish a policy of denying applications where applicants do not respond within 90 days to communications from the regulator.**

Documents related to a compliance action[2]

Before the regulator has decided what action to take

Part of a regulator's role is to ensure that a charity complies with the law. Usually compliance actions are audits of the charity's books and records. These activities are part of enforcing the law. Therefore, we do not believe that any internal or external documents related to ongoing compliance actions should be disclosed.

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[2] In relation to the regulator's compliance program, we exclude from consideration the special procedures for handling security or criminal intelligence reports under the *Charities Registration (Security Information) Act*.

After the regulator has decided what action to take

We have struggled with the question of whether or not the fact that a charity has been audited should be disclosed. On the one hand, we are concerned that some people might come to unfavourable conclusions about a charity simply because it has been audited. On the other hand, we think it can be beneficial to a charity, and to the public's trust in the sector, for audits to be made public. Our interim proposal was that the regulator should be allowed to disclose the fact that an audit has taken place if it is requested to confirm this.

This raises the question of whether results from an audit should be reported. To be consistent with our recommendations on the compliance regime in Chapter 6, we conclude they should not. However, we propose to allow the regulator to say, in response to a question on what the outcome of an audit was, whether an intermediate sanction has been imposed. As we note in Chapter 6, this information would already be available, in that these sanctions would be publicly reported.

If an audit reveals information that leads to an application to deregister a charity, that information too will be available through the sanctions regime we have recommended.

The detailed information that was obtained during the audit as well as the regulator's instructions to the auditor should not be publicly available.[3] Legal opinions obtained by the regulator, because they are privileged, should also not be available.

What we heard

In discussing what information should be released about the audits of charities that the regulator conducts, many people in the consultations noted that the public views the word "audit" negatively and as indicating the existence of probable wrongdoing. There is also little public understanding about what an audit is and why an audit takes place.

We heard strong agreement with our proposal that the fact that an audit is being conducted should not be released to the public. The harm that could be done to a charity's reputation by releasing such information, especially given the length of time it takes to complete some audits, was seen to outweigh any possible benefit to donors.

Opinion was more varied on the question of what should be available after an audit is completed. Just under a third of the commentators wanted to make more information accessible than we proposed. These commentators argued that donors have a right to know about an organization's compliance status and would be reassured by evidence of the regulator's compliance work. They called for various versions of a published listing of all organizations audited plus the results of audits.

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[3] Note, however, that in Chapter 3 under "Coordinated regulation" the Table is recommending that information obtained during an audit could be made available to other regulatory authorities.

On the other hand, a similar number called for less information than we proposed. These people would either release no information about audits, or would have the regulator report on the audit program in its annual report, giving the numbers audited, compliance problems found, and outcomes but without identifying any individual organizations. They felt that simply associating the word "audit" with an organization's name could harm it, even if the audit revealed no significant problems.

Most of the remaining comments either supported our original proposal or wanted only to identify charities whose audit had shown serious and unresolved compliance problems.

Our conclusions and recommendations

Currently, when the regulator sends an auditor to a charity, the auditor is usually instructed to examine two or three matters. These matters could range from checking that donation receipts have been properly issued to whether the organization's programs still qualify as charitable. Accounting questions may or may not be involved. Referring to this process as a "compliance audit" may help make the point that more than financial detail is involved.

A number of reasons may prompt one of these compliance audits. A relatively small percentage are purely random. These provide the regulator with baseline data on general compliance standards. The majority are conducted for various reasons:

- as repeat visits to determine whether a previously identified problem has been resolved;
- because the regulator has decided to concentrate on a particular compliance area; or
- as a response to complaints the regulator has received.

While there were some calls during the consultations for greater clarity on how organizations are selected for audit, we accept that any regulatory agency cannot telegraph the direction of its compliance program too precisely. Nevertheless, there appears to be a need for the regulator to provide more education to the sector and the public about the audit function.

Given the variety of opinions expressed during the consultations on what should be released about audits, we reconsidered the matter. We have now decided against allowing the regulator to acknowledge whether an organization has been audited or not. It is still our view that greater transparency on audits can serve a number of goals, including that of alerting potential donors when an organization is having serious problems in complying with its legal requirements. However, we believe that the public identification of organizations that receive sanctions, as proposed in Chapter 6, meets this goal to some extent. Ideally, donors should know as soon as possible if an organization is in difficulty, but any earlier release of information than at the point where a sanction is imposed opens up the possibility of unnecessarily damaging the reputations of perfectly legitimate organizations.

Other goals of releasing audit information are to use audit results to educate other charities and to allow public scrutiny of the regulator's decision making in this area. We believe these latter two goals can be largely met through the regulator using its annual report to convey general information about the number of audits, the kinds of compliance issues raised,[4] and the outcome of the audits, without identifying the organizations concerned.

We believe the ministerial advisory group should review the question of the transparency of the audit process after a couple of years to determine whether our proposal is adequately meeting the goals we have identified.

We further believe the regulator's annual report should include a statement of service standards and how well they are being met. The number of outstanding audit files should be included among these standards. This would permit monitoring of the existing problem of long delays in closing audit files. These delays detract from public trust in the regulator; they are unfair to the charity under audit; and they undermine the effectiveness of the regulator's compliance program. While acknowledging that some audits raise complex issues that require time to resolve, we are recommending, nevertheless, that the regulator take steps to ensure that, on average, audits are finalized more promptly.

Recommendations

34. No organization-specific information about compliance audits should be released, including acknowledging whether an organization is or is not under audit, unless in connection with the imposition of a sanction.

35. The regulator should provide more education to the sector and the public about the audit function.

36. The regulator should provide an account in its annual report of its compliance audits, including the number conducted and the length of time taken to complete audits.

37. The question of transparency in the audit function should be reviewed in two years, by the ministerial advisory group.

38. The regulator should finalize audits more promptly.

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[4] Classifying compliance issues for reporting purposes can be done in various ways. The regulator may need the advice of the ministerial advisory group to develop a system that is useful to donors, charities and the regulator alike.

Documents on a charity's file that do not relate to either the application for registration or a compliance action of the regulator

As a normal part of its operation, a regulator will gather information about a charity, including information filed by the charity as required by law or policy and decisions of the regulator on such issues as accumulating assets or obtaining permission not to meet the disbursement quota. Information filed by the charity as a result of law or policy should be available to anyone on request, as should any response from the regulator.

By law, every charity must file a *Registered Charity Information Return* (T3010) each year. The form, which has been redesigned as a result of our work, already contains information that is available to the public as well as certain confidential information. We would maintain the status quo and continue to make the annual information returns available on request. As the regulator's technological capabilities improve, we suggest that returns for each charity be available on-line.[5] We leave it to specialists to determine how best to accomplish this and encourage them to give priority to the project.

We are recommending one change related to information filed with the annual information return. The form requires that every charity file its financial statements with the return. However, the charity is allowed to decide whether or not the financial statements should be made public. The Charities Directorate's position is that, because the statements are attached to the form, but not part of it, Directorate staff have no power to release the statements without the charity's consent.

We think this discretion should be taken away from charities and the financial statements should be released on request. While the T3010 does contain some financial-reporting information, the financial statements provide more information and sometimes information that is particularly important to understanding how a charity operates. Information on such issues as related-party transactions and contingent liabilities is clearly relevant to people with an interest in a particular charity. We therefore propose that the necessary legislative change be made to allow for release of financial statements filed by a charity.

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[5] The Charities Directorate is now posting the returns on its website.

We would maintain an exemption only for that small number of religious organizations that currently are exempt from certain reporting requirements. These charities do not receive gifts from other charities nor do they issue receipts for donations.[6]

What we heard

We received few comments on our proposal that requests for special permissions allowed in the law and the regulator's response should be available on request.

The majority of those who commented, however, supported our proposal on releasing financial statements.[7] They saw this as a way for charities to provide accountability to the public or to increase donor confidence, with some commenting that the annual return did not provide sufficient information to donors or granters.

However, even among those supporting the release of financial statements, there was some concern about the capacity of the public to understand them and the uneven quality of the reporting. Many felt that the accounting profession, the sector, and the regulator needed to work together to develop improved reporting standards of relevance to donors and charities and to find ways to help smaller charities improve their statements. As we noted in Chapter 3, we believe this is an area in which the regulator should play an active role.

Our conclusion and recommendations

Based on what we heard, we confirm our interim proposals related to documents on a charity's files that do not relate to either the application for registration or a compliance action of the regulator.

Recommendations

39. **If requested, the regulator should provide a copy of information a charity is required by law or policy to file in seeking special status or exemptions allowed under the *Income Tax Act*, as well as any response from the regulator.**
40. **If requested, the regulator should provide a copy of the financial statements that charities are required to file with their annual information return.**
41. **The policy granting certain religious charities an exemption from public reporting of financial information should remain as currently formulated.**

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[6] The exemption was granted in 1977, when the T3010 first became a public document. Some 300 organizations are covered by the exemption. They mainly hold funds to provide pensions for members of various religious orders.

[7] There was virtually no opposition to our proposal that the existing policy exempting certain religious organizations from publicly reporting financial information (which would include their financial statements) should stay as it is.

Information not dealing with any specific organization

The regulator holds other types of information that could be made available subject to the provisions of the *Access to Information Act* and the *Privacy Act*. These include:

- policies and procedures,
- a list of regular charities,
- a research database on court decisions,
- draft policies ready for consultation, and
- operational guidance.

Policies and procedures

The current procedures leave the charitable sector, its legal advisors, and the public "in the dark" about how CCRA exercises its discretion. When an organization is denied registration as a charity, that information will be made public only if the organization appeals the decision to the Federal Court of Appeal, an unlikely occurrence, or if the organization chooses to share with others the letter by which its application was denied.

The lack of precedents, when combined with the lack of availability of CCRA's policies and operational guidance, makes it difficult for organizations to determine, in advance, whether they will qualify or how they need to structure themselves so that they will qualify for registration.

When examiners review an application for registration, they have to take into account internal policies of the CCRA. While this type of information is already accessible under the *Access to Information Act*, we conclude that steps should be taken to actively publish it. The Charity Commission of England and Wales is currently involved in a process to make all such information available on its website, and we believe a similar initiative should occur in Canada. We accept that the CCRA's existing material is not compiled in a way that will make this an easy exercise, but it is one we believe is necessary. We do not think it desirable for all policies to be released. Again, we would follow the provisions of the *Access to Information Act*. In some cases, the policies and operational guidance are in the nature of "triggers" that an examiner should look for to avoid being "taken in" by an unscrupulous applicant. This sort of "intelligence" information should remain confidential.

A list of registered charities

Currently, people can search on the CCRA website for a list of registered charities. That list also shows the address and designation of each charity.[8] The regulator should continue to maintain a searchable list of registered charities. As time and resources permit, additional information should be made available through that list, including the annual information returns.

A research database on court decisions

For the same reason that we believe the regulator's policies and procedures should be available, we encourage the regulator to include on its website a searchable version of a database that includes:

- information about court decisions,
- previous decisions of the regulator, and
- information from other regulatory bodies that may be of value to people seeking information about charities.

Draft policies ready for consultation

Along with its publications, the Charities Directorate has, over the last several years, done an effective job of making draft policy documents available when seeking public consultation. We encourage the regulator to continue this practice, although we also encourage it to find ways to make more broadly known that the drafts have been posted on the website and that public comment is invited.

As part of making the regulator's website a key resource for charities wanting to track and respond to proposed changes in the regulatory environment, we also urge that the website be used to notify charities of impending legislative amendments.

Operational guidance

The sector, the public and, we believe, the regulator itself would also be well served if the regulator were more proactive in releasing operational guidance to charities. Currently, the Charities Directorate issues periodic newsletters to charities containing information that is of value to ensure that the charities remain in compliance with law. The Directorate, through its compliance work and its client-assistance work, is in a unique position to identify trends that may be worrisome or problematic. We believe the regulator needs to be far more active in providing information.

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[8] A registered charity may be designated as a charitable organization, a public foundation or a private foundation.

This role should not come into play only after an organization has been audited or sanctioned. The regulator should, through newsletters, its website, and appearances by its staff at events involving charities, be working diligently to communicate important operational information to charities. We acknowledge that the regulator has, over the past several years, done a much better job of ensuring its publications are more widely available. However, we do not believe it should wait until a publication is necessary and developed before making this sort of operational guidance available.

What we heard

Participants welcomed our interim proposal that the regulatory authority allow easy public access to its policies and research database. Participants believed that opening up this information would help to dispel the aura of mystery that surrounds current regulatory decision making. One suggestion was that the database include technical interpretation letters and relevant letters issued by the CCRA's Rulings Directorate.

Our conclusion and recommendation

We confirm our interim proposals, but would add technical interpretation letters and relevant rulings issued by CCRA's Rulings Directorate to the materials that should be included on the regulator's website.

Recommendation

42. The regulator should publish on its website (and make print copies available on request), subject to the provisions of the *Access to Information Act* and the *Privacy Act*:

- **42.1 its policies and procedures;**
- **42.2 its research database (including copies of relevant court decisions, its own previous decisions on novel or unusual applications, relevant information from other charity regulators, and technical interpretation letters, as well as relevant letters issued by the CCRA's Rulings Directorate);**
- **42.3 draft policies ready for consultation;**
- **42.4 impending legislative changes; and**
- **42.5 operational guidance for charities.**

Chapter 5
Appeals

Chapter 5

Appeals

The existing appeals system has been described as not easily accessible and too expensive. Because only a few cases have been decided under the existing system, there is insufficient guidance for the regulatory authority and the voluntary sector. Reform of the system should allow for greater access to appeals and a richer accumulation of expertise by adjudicators.[1]

The current environment

Role of the courts

Currently the *Income Tax Act* specifies that organizations seeking recourse must turn to the Federal Court of Appeal if the Charities Directorate:

- denies their application for registration as a charity;
- takes away their registration; or
- gives them a designation (as a charitable organization, public foundation, or private foundation) with which they disagree.

The Federal Court of Appeal decides cases "on the record," that is, on the evidence that has already been gathered. The "record" in charity cases is made up of the materials assembled by the organization and the CCRA during the course of an application or a deregistration. Moreover, the proceedings of the Federal Court of Appeal are formal. Unless the court decides otherwise, which it has done in a few charity cases, parties appearing before it must be represented by counsel.

Almost all other disputes[2] under the *Income Tax Act* use the Tax Court as the first court level, with the Federal Court of Appeal serving as the appellate court.

The Act contains no appeal provisions for the many decisions the Charities Directorate makes that affect how charities operate on an ongoing basis. These decisions mainly involve special permissions relating to the minimum amount that charities have to spend on their programs each year. However, the courts can still review these decisions, like all administrative decisions.[3]

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[1] *Working Together: A Government of Canada/Voluntary Sector Joint Initiative*, 1999.

[2] Apart from the decisions of the Charities Directorate, the only other CCRA decisions that are appealable directly to the Federal Court of Appeal are those of the Registered Plans Directorate (registered pension plans, registered education savings plans).

Internal administrative review

The Act also contains no provisions for any administrative review of the Charities Directorate's decisions, short of a formal appeal to the court. For nearly all other tax issues, the Act sets out procedures for objections and appeals, as administered by the CCRA's Appeals Branch. This internal review process leads to a fresh look at a case.

While Appeals Branch officers base their decisions on the facts that have already been recorded, they often receive and consider new information that was not available at the local tax services office. If a person is not satisfied with the Appeals Branch decision, the case can then be appealed to the Tax Court. The person also has the option of proceeding directly to Tax Court, rather than dealing first with the Appeals Branch.

The Federal Court of Appeal has held that procedural fairness obligates the Charities Directorate to invite submissions from an affected charity before proceeding to deregister it.[4] Although the Court has not called for submissions from an organization for the registration process, this would likely be required under current principles of procedural fairness.

In practice the Charities Directorate, in handling both registrations and deregistrations, does invite submissions. It presents its preliminary assessment in an Administrative Fairness Letter to an organization and invites it to respond to the concerns the Directorate has raised. Organizations can and do reply by telephoning or meeting with Directorate officials, but usually respond only in writing. Afterwards, if the decision is negative, it is reviewed by each higher level in the Directorate until the Director General issues a Final Denial or Deregistration Letter.[5] Once this letter is signed, the administrative process is over, and any further proceedings must be at the judicial level.

Review of positive decisions

No comparable appeals procedures exist to check the correctness of positive decisions. This is because there is no right of third parties to challenge the CCRA's decision either to register or to maintain the registration of a charity.

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[3] The courts have the jurisdiction to review administrative decisions. Such a review usually focuses on how a decision is reached, in order to ensure that there is procedural fairness in the decision making and that the decision is not unreasonable. If an application for judicial review is successful, the court normally sends the matter back to the administrative body for decision instead of substituting its own decision.

[4] *In re Renaissance International v. M.N.R.* 83 D.T.C. 5024.

[5] The Directorate uses somewhat different terminology for the various stages of deregistration, because deregistrations become effective only when the decision is published in the *Canada Gazette*, not when the Director General signs the Final Letter.

Recent experience

Between 1980 and 2002, 136 charity appeals were received: 28 from proposed deregistrations and the rest from the Charities Directorate's refusal to register an organization. The outcomes of these appeals are shown in Table 1.

Table 1

APPEALS, 1980-2002	
Cases still pending	**6**
Went to hearing; organization registered	**5**
Case discontinued; organization registered	**28**
Went to hearing; organization not registered	**23**
No hearing; appeal withdrawn or dismissed by the court; organization not registered	**74**

These figures do not tell us how many organizations would use a more accessible appeals system if one were in place. The best estimate we could arrive at is that a new system could attract some 70 charity cases each year.[6]

Between 1993 and 2002, the Federal Court of Appeal heard 15 charity cases. For these, the average time between launching the appeal and the judgement being rendered was 25 months for cases involving a refusal to register and 29 months for cases involving a deregistration.

Perhaps the most striking thing about the number of appeals that have been launched from the Charities Directorate's decisions is that only 28 charity cases in total have ever gone to court. And of these 28 cases, nearly half have produced judgements that were brief, dealt with procedural issues, or otherwise did not produce precedents in charity law. In making its decisions, the Directorate must rely largely on the common law, found in previous court decisions, to determine what is and is not charitable. While the Directorate can look at charity decisions made at the provincial level (for example, decisions dealing with municipal taxation or the interpreting of wills) and similar cases in other countries, these are not binding in cases involving charitable registration under the Canadian *Income Tax Act*.

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[6] This tentative estimate does not include charity cases arising from the regulator's use of the intermediate sanctions we are proposing in Chapter 6.

Factors affecting the reform of the existing appeals system

In weighing the various options for reform, we have kept the following objectives in mind:

- transparency of the proceedings to the organization, the voluntary sector and the general public;
- correctness of the decision, including consistency in the decision making;
- independence of the adjudicator;
- prompt resolution of disputes;
- creation of precedents for the guidance of the regulatory authority and the sector;
- accessibility, in terms of location, procedures and costs to the organization;
- creation of a complete evidentiary record; and
- the cost to government of establishing and maintaining the appeals system, including not duplicating existing mechanisms for review that could be readily adapted to handle charity cases.

Transparency

Transparency is a factor affecting how the decision making is perceived. On the one hand, the courts with their decisions and the evidence they relied upon are usually fully in the public domain. On the other hand, internal review panels sometimes operate on a confidential basis. This enables them to use various alternative dispute resolution techniques, but does nothing to promote an understanding of their decisions.[7]

Correctness of the decision

A primary goal of any appeals system is to make sure that the correct decision is made. A "correct" decision is one that is not only technically right in law, but also one that is generally perceived to be just. That is, the decision maker has reached a decision that is consistent with previous cases while, where it is appropriate, developing charity law that reflects changes in society. How much flexibility in developing the law is expected from an administrative body? At what point does flexibility tip over into decision making that is inconsistent and lacking a proper legal basis?

In considering procedures at the various levels of appeal, another factor bearing on the quality of the decision making is the role, if any, third-party interveners should play. One concern is the inability of those not directly affected to provide input in the initial decision making. Should such a role be built into the appeals mechanisms, recognizing that those opposed to a particular organization may want to participate as well as those supporting it? Another factor to consider is that such interventions can eat up the time of a court or tribunal, unless some limitation is placed on them.

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[7] Moreover, as pointed out in the chapter on Accessibility and Transparency, transparency must be balanced against other values, such as protecting an organization's reputation from unwarranted harm.

If a lower-level decision maker is to hear a case before it goes to the Federal Court of Appeal, are there any candidates for this role with expertise in charity law or that are more familiar with working with common law as opposed to statute law?

Independence of the decision maker

One factor affecting how an appeals system is perceived is the degree of independence held by the decision maker. On a continuum, judges lie at the far end of independence. Their independence from all influences is a constitutional guarantee. Other decision makers have lesser degrees of independence. A review panel inside the regulatory authority may be seen to operate with less independence from the regulatory authority than a quasi-judicial tribunal completely outside the agency. A quasi-judicial tribunal may not be seen by the public to operate as independently as a judge.

Prompt resolution of disputes

The courts cannot handle every dispute that arises in the course of administrative decision making. How, then, to decide which cases can and should proceed to the court level? At one level, the answer is that this is a matter for the affected organization to decide. But if the organization in question does not understand the legal issues in play, if it simply wants someone to take a second look at its case, or if it has suffered as a result of a decision at the initial level, an administrative review process may be more appropriate than the courts.

Obtaining more precedents

Precedents to guide administrative decision making are particularly important when the regulatory body has to rely on the common law to determine what is and is not charitable. The existing system has yielded only a handful of Federal Court of Appeal decisions on what it means to be a charity for the purposes of the *Income Tax Act*. Clearly, more precedents are highly desirable. However, a legally binding precedent means using the courts, with all the attendant costs and delays.

Securing sufficient precedents raises a number of issues. Should organizations involved in such cases also have to exhaust the administrative review process before they proceed to court? And what needs to be done to ensure that they do get to court and present the best possible case to the judge? The organization in question may decide not to pursue its case, because it does not have the resources necessary to prepare a case. A funding mechanism for appeals in turn raises questions about who decides which cases to bring forward, on what basis these decisions should be made, and how much money should be available.

Accessibility

Also to be considered is how to develop a more accessible appeals system. By accessible, we do not simply mean geographically accessible. The Federal Court of Appeal holds hearings at 17 venues across the country, and for charities an even greater number of locations may be desirable. However, the main concern is the ease and speed with which an appeals mechanism can be set in motion and the simplicity of the procedures at any subsequent hearing. Highly informal procedures are not likely to provide persuasive precedents, but they may serve a purpose that some may consider to be equally or more valuable – to provide organizations with an inexpensive and rapid means to have someone hear their case in a more informal atmosphere.

Constituting the record

In designing an appeals system, a critical issue is deciding at what point the case record is constituted, and what type of proceedings are necessary to properly constitute such a record. Once the record is constituted, any further appeals are based on the evidence in that record, and decisions are based on whether the law has been correctly applied to the facts at hand. Currently the record is the Final Decision of the Charities Directorate, plus all materials contained in the file that relate to that decision, such as the information provided by the organization in support of its application or the audit results that led up to a proposed deregistration. Many would argue that this prematurely closes off the possibility of introducing new evidence. Some would go further and say that such a record is deficient in not allowing sworn testimony and the cross-examination of witnesses.

Costs

Another concern arises as to the case that an organization might present to these next levels of judicial decision making. Good decisions typically depend on both parties fully presenting relevant evidence, jurisprudence and arguments before the decision maker. If relevant evidence or information is not presented, perhaps because one party does not have the financial backing and legal knowledge to fully argue its case, the decision may not be as useful as it could have been.

Administrative systems vary in their layers of appeal. The more layers, the more opportunities an appellant has to make its case. But the more layers, the more time consuming and costly the system becomes.

The efficiency of an appeals system has to be judged not only in terms of how expensive it is to the parties using it, but also in terms of how much it costs the government to establish and maintain it. There are cost implications to proposals to change the existing system by adding new layers of appeal or new institutions. Potentially, some proposals could reduce government costs if more informal procedures replace a hearing before the Federal Court of Appeal. But for other proposals, such as creating a new tribunal that would specialize in charity law, we would need to be convinced that no existing government review mechanism could adequately take its place.

What we heard

During our consultations, commentators endorsed our preliminary conclusion that the existing recourse mechanism for charities under the *Income Tax Act* is inadequate. A few argued that the effort to reform the system would be better placed elsewhere – in getting the initial decision right, in producing clear guidelines, and in educating applicants and existing charities on the rules so that there would be fewer disputes. However, these comments were outweighed by others pointing to the need to develop more case law, and to provide an accessible, inexpensive, and rapid recourse system for organizations, especially in light of the proposed introduction of intermediate sanctions (see Chapter 6).

Some commentators wanted to include another factor when assessing the various options for reform. In their view, those making decisions in the recourse system should be knowledgeable about the sector either in addition to, or instead of, charity law.

Reform recommendations

We accept the arguments in favour of reforming the existing appeals system. The single option now available, an appeal to the Federal Court of Appeal, has failed to create sufficient precedents or to provide organizations with an accessible and quick means of appeal.

Instead, we propose an appeals system for charity decisions that involves the following elements:

- internal reconsideration,[8] within the original decision making body;
- a hearing *de novo*[9] in the Tax Court; and
- an appeal on the record[10] to the Federal Court of Appeal.

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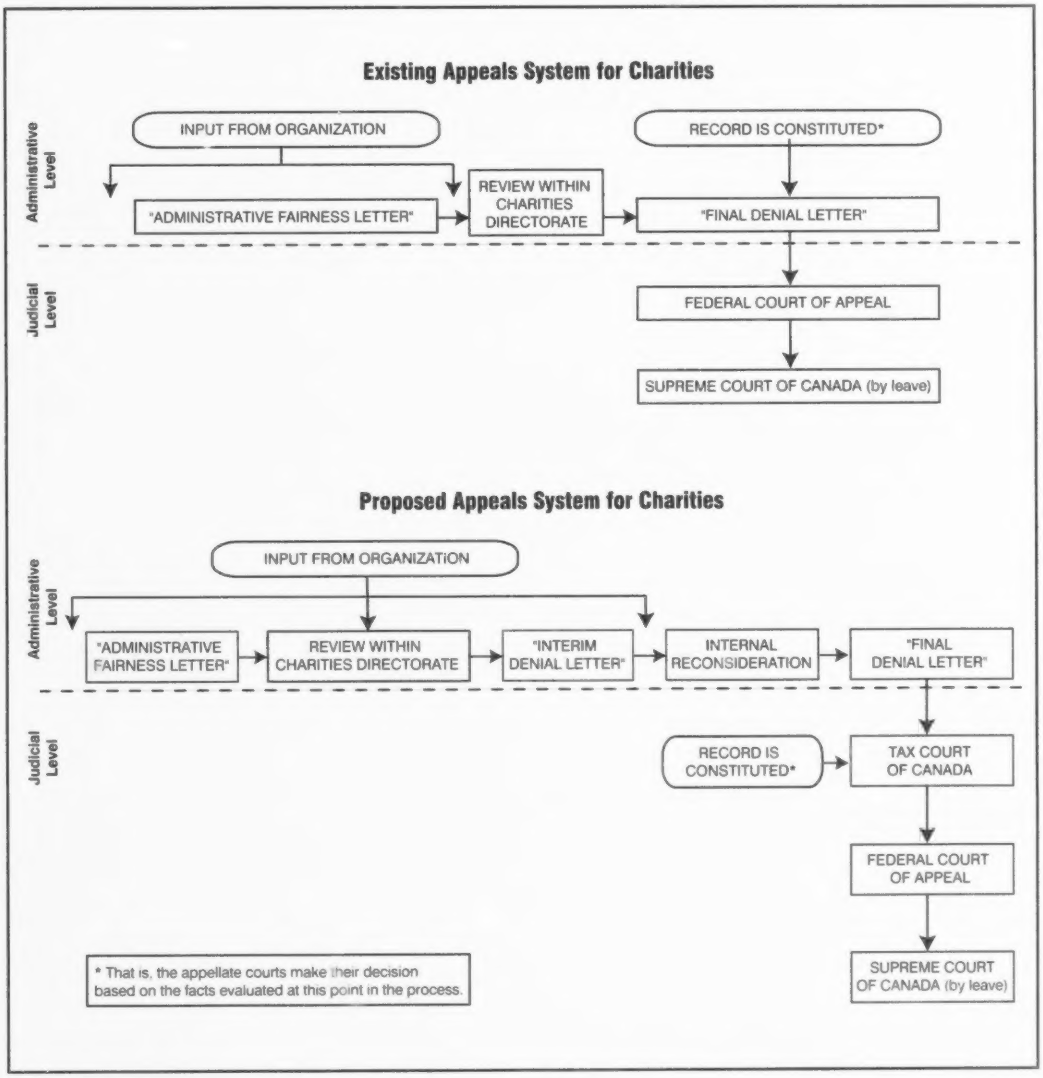
[8] These are internal processes within the original decision-making body. Various administrative decision-making bodies employ a wide variety of procedures – some review panels exist within the usual decision-making hierarchy, while others are removed from it; some focus on service complaints, while others study the correctness of the original decision; some accept new evidence, meet with the people seeking recourse, and employ alternative dispute resolution techniques such as mediation and arbitration, while others do not. Review processes are usually private, and decisions are often not published.

[9] *"De novo"* means starting afresh. Typically, such hearings are held at a lower court level than an appellate court. In a hearing *de novo*, the court does not rely on previously gathered evidence. Rather, its decisions turn on the evidence that is brought before it. An oral hearing is common, but a hearing can be held on a documentary basis.

[10] This involves an appellate court deciding whether a decision made by lower courts or administrative decision makers is correct, based on the evidence these decision makers had before them.

In addition, we make recommendations on the role of interveners, how costs related to an appeal should be handled, and the need for a special fund to subsidize appeals.

The following diagram illustrates the existing and the proposed appeal structure.


Existing Appeals System for Charities
Administrative Level
INPUT FROM ORGANIZATION
"ADMINISTRATIVE FAIRNESS LETTER"
REVIEW WITHIN CHARITIES DIRECTORATE
RECORD IS CONSTITUTED*
"FINAL DENIAL LETTER"
Judicial Level
FEDERAL COURT OF APPEAL
SUPREME COURT OF CANADA (by leave)
Proposed Appeals System for Charities
Administrative Level
INPUT FROM ORGANIZATION
"ADMINISTRATIVE FAIRNESS LETTER"
REVIEW WITHIN CHARITIES DIRECTORATE
"INTERIM DENIAL LETTER"
INTERNAL RECONSIDERATION
"FINAL DENIAL LETTER"
Judicial Level
RECORD IS CONSTITUTED*
TAX COURT OF CANADA
FEDERAL COURT OF APPEAL
SUPREME COURT OF CANADA (by leave)
* That is, the appellate courts make their decision based on the facts evaluated at this point in the process.

Internal reconsideration

We proposed that an organization should have the right to have its case reviewed by review officers[11]. These officers would be a part of the regulatory authority but separate from the initial decision makers. This provides the review officers with some degree of independence, although outsiders may still not see them as unbiased.

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[11] In our interim report, we referred to these officials as hearing officers.

Internal reconsideration would be easily accessible and virtually cost-free to an organization. Its procedures would be simple, involving a combination of paper reviews with written submissions and informal meetings (including phone conversations). It would also be speedy. We suggest a maximum of two months for reconsideration, unless both parties agree to extend the process. Reasons for decisions would be provided to the organization, but would not otherwise be made public except in a general report.

Reconsideration should focus on (1) identifying any errors made at the initial decision making stage and (2) listening to what an organization's representatives have to say. When a misunderstanding is the reason for the dispute, attempts would be made to resolve the dispute by determining whether the law has been correctly understood and applied. However, a review officer would be bound by the existing policies of the regulatory authority, although the officer could report an apparent need for change to the head of the authority.

We propose that, as a general rule, internal reconsideration should be mandatory. That is, a dissatisfied organization could not appeal directly to the court, but rather would first have to exhaust the internal reconsideration process. As a new process, reconsideration deserves the opportunity to establish its value in resolving disputes. We believe this can most readily be done by guiding organizations into what will at first be an unfamiliar process. However, an organization and the regulator should be allowed to agree to bypass reconsideration and move directly to court, if they choose to do so because, for example, both recognize that an important legal principle is in dispute that only a court can resolve.

What we heard

Most of those commenting on the subject supported introducing internal reconsideration into the recourse system. However, a few doubted that a body inside the regulatory authority would be sufficiently independent to overturn initial decisions.

Some commentators stressed the need for reconsideration to provide prompt recourse, so that an applicant organization does not lose momentum or a charity under a proposed sanction is not left in limbo. This raised the question of how long an organization should be given to file a claim for reconsideration. While 30 days is the usual period suggested, one brief argued that the system could get bogged down with applications for permission to file late protests, because in practice 30 days is insufficient time for a charity to decide whether it wants to seek recourse.

We assumed that the review process would be confidential. However, some participants cautioned against giving the appearance of closed-door deals.

Several speakers disagreed with our proposal that internal reconsideration should be mandatory. They would allow an organization to proceed directly to court instead of being obliged to spend time first seeking internal reconsideration. They pointed out that people and organizations disagreeing with the CCRA on other matters can go directly to court.

Our conclusions and recommendations

On the basis of our research on practices in other countries and within CCRA for other tax issues, we continue to believe that internal reconsideration can play a valuable role in a recourse system for charities.

To clarify, we are not proposing a "hearing," but rather a review of a file by an experienced officer, who is organizationally separated from the initial decision maker. Review officers would perform the same tasks and evaluations, and have the same discretionary powers, as the initial decision maker. In addition, they would look at the record established to date, so that they could correct procedural or legal error and resolve misunderstandings. In some cases, they might need to visit an organization to clear up misunderstandings, and their budget should allow for some travel. Their purpose, however, does not extend to advising a charity on how to get registered or avoid a sanction.

In *Working Together*, the first joint table proposed the use of alternative dispute resolution measures like mediation or arbitration at the internal reconsideration stage. With respect, we have concluded that such processes may not always be appropriate at the reconsideration stage, because they would tend to prolong this phase and make it more expensive. However, there may be situations where mediation could play a role, and we would commend its use to both review officers and charities as a mechanism to overcome difficulties.

While wanting internal reconsideration to be as speedy as possible, we accept that for many charities 30 days is too short a time to determine whether they wish to seek reconsideration. We believe a 60-day period would be more appropriate.

We have decided, however, to maintain our original proposal to make reconsideration mandatory, unless both parties agree to go directly to court. We continue to believe that a system that is efficient, low cost and user-friendly should be mandatory. We believe that exactly the same rules, as described in the previous chapter, should apply to the decisions of the reconsideration unit as apply to the regulator's original, non-appealed decisions. For example, nothing would be in the public domain if the decision is that no penalty is warranted, while a decision to register an applicant organization would be published with reasons on the regulator's website. However, we also believe that public scrutiny of the reconsideration unit should be facilitated by the regulator's annual report including statistics on the number and type of cases heard, and on whether the original decision was upheld or varied.

Recommendations

43. An independent unit should be established within the regulator to provide internal reconsideration both of applications for registration that have been denied and of sanctions the regulator proposes to impose.
44. Organizations should be obliged to seek internal reconsideration before proceeding to court, unless the regulator and the organization agree otherwise.
45. Organizations should have 60 days to decide whether to seek a review of their case, and the review unit should have 60 days to complete the review, unless both the review officer and the organization agree to extend the time-frame.
46. The review unit should be staffed by officers experienced in charity law and in dealing with sector organizations.
47. The review unit should be centrally located, but adequately resourced to permit officers to travel.
48. The review unit should be bound by the regulator's existing policies.
49. The review unit should provide the organization seeking review with written reasons for its decision.
50. The decisions of the review unit should be reported in accordance with the applicable transparency recommendations of Chapter 4, and the regulator's annual report should provide a statistical profile of the unit's work.

Hearing *de novo*

We considered three locations for holding such a hearing:

- a specially constituted tribunal to hear charity decisions;
- the Tax Court of Canada; and
- the Federal Court of Canada, Trial Division.

The idea of a specially constituted tribunal, that would specialize in charity law and potentially allow sector members to bring their expertise in the sector to bear on the decision making, is attractive. While the workload would probably not be enough to justify a permanent body, it would be possible for its members to assemble when needed. However, we propose using an existing court, partly for reasons of efficiency, and partly because the courts would not defer to common law decisions made by a non-judicial body. Therefore, in order to save extra steps in creating a body of binding precedents, we recommend moving directly from internal reconsideration into the existing court system.

In deciding between the Tax Court and the Trial Division of the Federal Court, there are arguments to be made for both courts. The Trial Division is accustomed to dealing with complex cases and the common law (as well as statute law) involving broad social issues, but has no recent experience with the *Income Tax Act*. The Tax

Court, on the other hand, is highly familiar with the *Income Tax Act* in that it handles virtually all appeals under this Act. However, it is primarily accustomed to dealing with statute law.

While the Trial Division does have a simplified procedure for some cases, and case management and dispute resolution tools, the *Tax Court of Canada Act* provides for cases to be decided using either a formal or an informal procedure. When acting informally, the Tax Court is not bound by any legal or technical rules of evidence in conducting its hearings. This enables the Court to deal with appeals quickly. Neither the formal nor the informal procedure requires parties to be represented by counsel. However, decisions made under the informal procedure are not precedent setting in the formal sense, and are final in that there is no further right of appeal arising from the decision, although the Federal Court of Appeal can still review them.[12]

Both the Trial Division and the Tax Court under formal procedure could create a satisfactory evidentiary record. Both courts allow for oral testimony. Admittedly, such testimony is likely to be helpful in only some charity cases (those where the facts are in dispute and credibility is an issue, or when personal testimony not obtainable through documentary evidence is needed). However, in cases where oral testimony is not required (primarily those where the matter in dispute is a question of law), the rules could allow the parties to dispense with witnesses. Instead, they would rely on documentary evidence and oral argument, which would result in simpler and less costly proceedings.

On balance, we propose using the Tax Court as the hearing court, primarily on the basis that both its formal and its informal procedures make appeals more easily accessible for organizations than the equivalent procedures in the Federal Court Trial Division. This would also be true for geographic access. The Tax Court sits in 68 locations, as opposed to the Federal Court's 17 locations.

What we heard

Opinion was split on our interim proposal that the recourse system for charities should include a hearing *de novo* in the Tax Court. Roughly half agreed, seeing the Tax Court as providing a venue from which more precedents for the guidance of the sector and the regulator could be obtained, and which would be more accessible and less costly to organizations. Some explicitly favoured the Tax Court over a specialized tribunal, in that a tribunal would entail start-up costs and would, in their view, create an overly complex and potentially confusing system, with its blend of courts and administrative tribunals.

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[12] The Tax Court's current rules on what cases can be heard under its informal procedure (which are based on such criteria as the amount of tax in dispute) would have to be adapted to the charity context. The possibility of charities using the informal procedure would be conditional on the Court agreeing to change its rules.

However, an equal number disagreed with our proposal. Most of these wanted a specialized tribunal or arbitration panel instead of the Tax Court. The advantage of such a body, in their opinion, was that it could develop expertise in charity law and include members familiar with the sector. Charity cases, they argued, are not really about tax law.

A few questioned the need for any type of hearing *de novo*. These included commentators who were concerned that:

- organizations would do an "end-run" around the initial decision makers, hoping for a more favourable outcome at the hearing level;
- the initial decision makers would come to rely on others to move the law forward and so adopt a conservative approach to their work; and
- a hearing, especially if witnesses were on the stand, would be more expensive than the current system (both to the organization and the regulator) and slower, given the possibility of an additional layer of appeal.

Others questioned the need for an oral hearing to determine what are primarily questions of law.

Our conclusions and recommendations

While recognizing the validity of many of the points raised during the consultations, we believe that a recourse system that is handling both denied applications for registration and sanctions on a charity requires some form of accessible hearing *de novo*. A hearing *de novo* lets organizations put their case before a fully independent arbiter if they are dissatisfied with the outcome of internal reconsideration. Oral testimony and cross-examination permit questions of potential regulatory bias to be tested.

We also continue to believe that the Tax Court is to be preferred over a specialized tribunal. Only a court can establish the precedents on which the common law of charity is based. As well, we doubt that a convincing case for creating a new tribunal can be made based either on its projected workload or on the unique needs of charities.

While we agree that a regulatory system (comprising both the regulator and the associated appeals mechanism) needs to be knowledgeable about those it is regulating, we are not convinced that members of the sector need to serve as adjudicators in this system. The background knowledge needed for effective decision making can be introduced by other mechanisms. The organization in question has some responsibility for bringing key factors to the adjudicator's attention. As well, broader factors can be introduced through the policy surveillance exercised by the ministerial advisory group at the administrative level and through interveners at the court level. We discuss the role of interveners later in this chapter.

On balance, we believe the Tax Court provides the most accessible option for a hearing *de novo*. We acknowledge that the Tax Court has no recent experience with charity law, although its predecessors (the Income Tax Appeal Board and the Tax Review Board) determined which organizations were charitable. However, we believe that any court is capable of developing the expertise it needs.

Recommendation

51. Careful consideration should be given to making the Tax Court of Canada the site of appeals from decisions of the regulator, and such appeals should be held by way of hearing *de novo.*

Appeal on the record

The existing system, under which appeals from a Tax Court decision on a matter of law or mixed fact and law can proceed to the Federal Court of Appeal, should be followed.

This proposal attracted little attention in the consultations.

Recommendation

52. An appeal on the record from the Tax Court should lie to the Federal Court of Appeal.

Judicial review of administrative decision making

The Tax Court of Canada does not have the power to judicially review an administrative decision. The Federal Court Trial Division should continue to play this role.

This proposal attracted little attention in the consultations.

Recommendation

53. The Federal Court Trial Division should continue to provide judicial review of administrative decisions.

Interveners

We suggest that the current rules established by the various courts provide adequate opportunity for interested parties, including members of the voluntary sector, to present their views in significant cases. Under its formal procedure,[13] the Tax Court, for example, allows a person claiming an interest in a proceeding to apply to the court for leave to intervene. If allowed, the person intervenes as a friend of the court for the purpose of assisting the court with evidence or argument.

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[13] The Tax Court's current rules do not allow interveners when it is operating under its informal procedure. While an amendment to the rules to allow for third-party intervention in these proceedings could be sought, it is believed that charity cases using the informal procedure would not likely raise issues of general interest.

We are not recommending the adoption of a provision similar to that found in the British *Charities Act*, which allows third parties to challenge the decision of the Charities Commission to register an organization. In our view, the possible gain in ensuring that only properly qualified organizations are registered is outweighed by the possibility of harassing legal actions.[14]

This proposal also attracted little attention in the consultations.

Recommendation

54. Existing court rules should apply in determining whether to allow interveners in a case.

Costs

It is necessary to distinguish between costs awarded by the court in the course of its decision, and the various expenses that the parties actually incur before that decision is rendered. Even if the court were to award costs that covered the actual expenditures incurred, which is seldom the case, the parties have to have the money in hand in order to bring the case forward.

We propose that the regular cost rules apply at the Tax Court level. After a hearing, the Tax Court determines whether to award costs and at what level.[15] For appeals from the Tax Court to the Federal Court of Appeal, and from the Federal Court of Appeal to the Supreme Court, the court would determine the level of the costs, and also determine if costs should be awarded against an organization when it appeals and loses. Therefore, above the Tax Court level, the system would look like this:

- If the regulatory authority appeals a lower-level court decision, the regulator would pay the costs of the organization.
- If the organization appeals a lower-court decision, and wins, the regulator would pay the costs of the organization.

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[14] However, as described, in the Institutional Models chapter, under Model 3 (Enhanced CCRA plus Commission) and Model 4 (Charity Commission), the CCRA would have the right to challenge the Commission's decisions. Under Model 1 (Enhanced CCRA) and Model 2 (Enhanced CCRA plus Voluntary Sector Agency), the current system would continue: the CCRA would remain solely responsible for initiating actions designed to correct errors in registration.

[15] The Tax Court rules summarize the criteria used by the courts in exercising their discretion to award costs as follows:
(a) the result of the proceeding,
(b) the amounts in issue,
(c) the importance of the issues,
(d) any offer of settlement made in writing,
(e) the volume of work,
(f) the complexity of the issues,
(g) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding,
(h) the denial or the neglect or refusal of any party to admit anything that should have been admitted,
(i) whether any stage in the proceedings was
    (1) improper, vexatious or unnecessary, or
    (2) taken through negligence, mistake or excessive caution,
(j) any other matter relevant to the question of costs.

- If the organization appeals the lower-court decision, and loses, the organization is responsible for its own costs. Although it would be normal practice for the regulator not to seek its costs, it could seek costs if the appeal was frivolous or designed primarily to delay a regulatory action. The court would then decide whether the awarding of costs is justified in the circumstances.

Again, this proposal attracted little attention in the consultations.

Recommendation

55. Existing Tax Court rules on awarding costs should apply to charity cases heard before it but, in subsequent appeals, provision be made that:

55.1 regardless of the outcome of the appeal, the regulator would bear the costs of both parties, if it initiates the appeal from the lower-court decision;

55.2 the regulator would bear the costs of both parties, if the organization initiates the appeal from the lower-court decision, and the appeal court overturns the lower-court decision in the organization's favour; and

55.3 in all other cases, the regulator would bear its own costs, except that, if it considers an appeal frivolous or designed to delay, the regulator could ask the court to award it costs.

Appeal fund

We stress again the importance of precedents to the framework employed by the *Income Tax Act* for the registration of charities. More precedents would help to clear up grey areas in the common law and to adapt charity law to changes in society. For this reason, we believe that, in appropriate circumstances, the expenses for developing and presenting a case to the hearing court should be subsidized. Interveners should also receive funding where their intervention would assist the court in developing the law.

The difficulty lies in selecting appropriate cases for subsidy and in determining how much should be spent. We suggest that the selection be made by a body independent of the regulator. This would avoid placing the regulator in a possible conflict of interest and enable it to argue that in fact the law in this area does not need to be clarified.

As for the amount that should be allocated to the program, we note that there is a backlog of issues needing to be addressed.

What we heard

During the consultations, we heard overwhelming support for our proposal to develop charity law by subsidizing appeals where the issues at stake are potentially precedent-setting. While many participants conceived of such a fund as a form of legal aid for small organizations, the majority recognized that public funding for such appeals is only justifiable on the grounds of the broader public interest served in obtaining judicial clarification of charity law.

Nobody wanted to see the regulator administering such an appeal fund. Participants suggested a number of alternative mechanisms, including a joint sector-government body and a ministerial advisory group. Some participants were familiar with the Court Challenges Program and felt that it could serve as a model. (This Program currently selects cases for funding that involve significant issues under the *Charter* or the *Official Languages Act*.)

Our conclusions and recommendation

We continue to believe that an appeal fund is necessary and that it should be used to subsidize cases of substantive importance, and not as a form of legal aid. We also believe that a body at arm's length to both the government and the sector is required to administer the fund.

We have looked into how the Court Challenges Program operates and believe this Program can serve as a model for the administration of an appeal fund for charity law.

Recommendation

56. An appeal fund to develop and present charity cases under the *Income Tax Act* should be established; and

  56.1 the fund should be administered by a body like the Court Challenges Program;

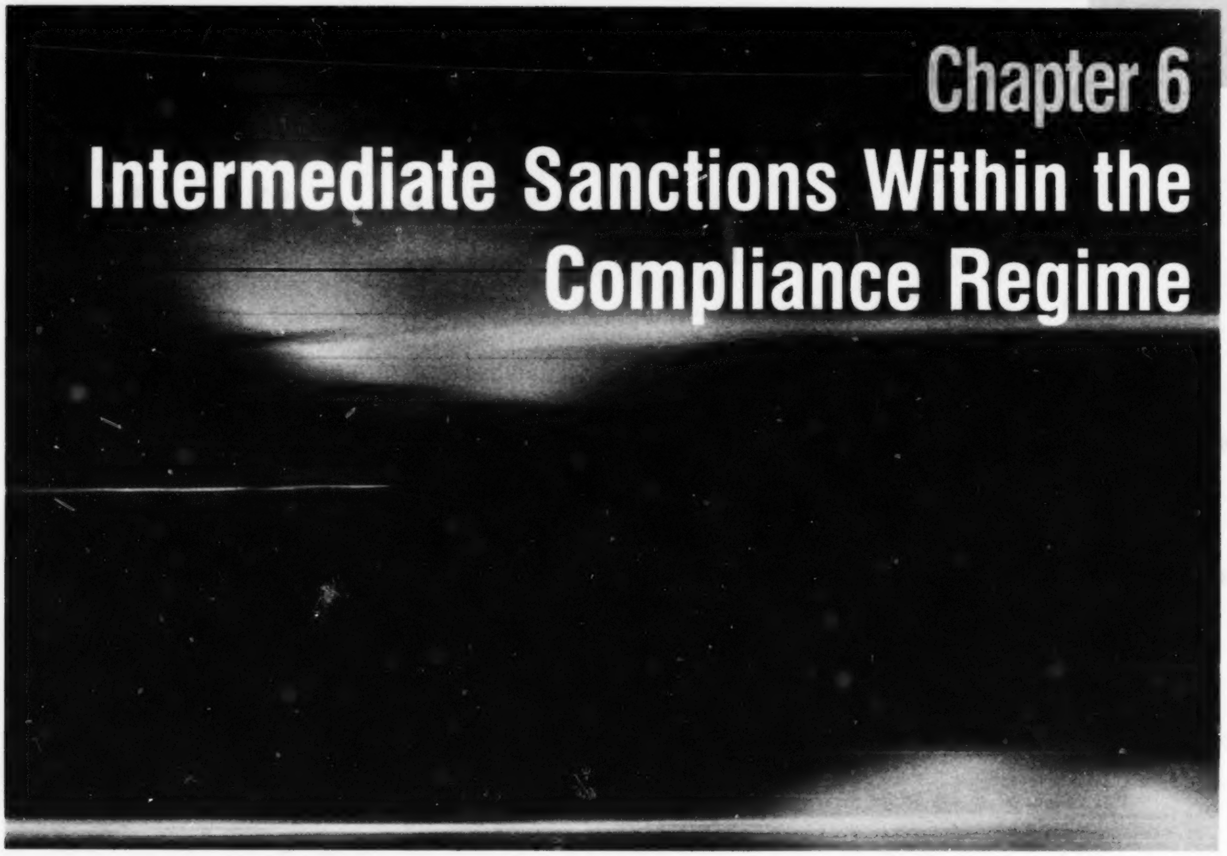
  56.2 cases should be selected for financial support on the basis of their potential to clarify charity law, for the benefit of the public at large, the sector and the regulatory authority;

  56.3 additional funding should be provided for the appeal fund, of sufficient size to obtain cumulatively the desired effect of clarifying charity law; and

  56.4 financial support should also be available for interveners.

Chapter 6

Intermediate Sanctions Within the Compliance Regime



Chapter 6

Intermediate Sanctions Within the Compliance Regime

Background

We were asked to make recommendations on the possibility of introducing intermediate sanctions. These would be new penalties that would give the regulator tools, short of deregistering an organization, with which to encourage charities to comply with the legal requirements. To make recommendations in this area, we had to consider the role of such penalties within the whole range of actions a regulatory body can take to encourage compliance.

Deregistration is the primary penalty currently under the *Income Tax Act* for charities that do not comply with the requirements. Once deregistered, an organization faces severe consequences. Not only does it lose the right to issue official donation receipts for the gifts it receives and, potentially, its tax-exempt status, it may also have to pay the revocation tax. This tax requires the organization to pay an amount equivalent to its remaining assets to another charity or to the government.

Charities can appeal deregistration to the Federal Court of Appeal. The names of deregistered organizations are published in the *Canada Gazette*, and the Canada Customs and Revenue Agency's letter listing the reasons for deregistration is a public document.

The *Income Tax Act* also includes other penalties – such as penalties for the misuse of certified cultural or ecological property and for gifts between charities that are used to cover up a failure to meet the minimum spending requirement (the "disbursement quota"). However these penalties are rarely used.

The Charities Directorate **annuls** the registration of organizations that are and have always been non-charitable – those that were registered in error. These organizations do not have to pay the revocation tax. Annulments are always consensual, although if an organization does not agree, it faces deregistration and the revocation tax. If asked, the CCRA can reveal that an organization's registration has been annulled, but no other information about individual annulments is made public.

Deregistration is an optional penalty. In practice, the Charities Directorate deregisters charities only if they:

- fail to file their annual return after repeated warnings; or
- are involved in serious or continued non-compliance.

As Table 2 indicates, few charities lose their registration for serious or continued non-compliance. Only 2% of the 500–600 audits conducted each year reveal problems serious enough for the Directorate to proceed with deregistration or annulment. A "voluntary" deregistration occurs when an organization is ceasing operations.

Table 2

Deregistrations, 1998-2002

	1998	1999	2000	2001	2002
Deregistrations: voluntary	623	727	914	613	805
Deregistrations: failure to file	1087	886	2742	2097	1606
Deregistrations: "serious"	2	6	14	13	5
Annulments	2	7	13	14	6

Factors affecting a fair and effective sanctions regime

Compliance vs. sanctions

The purpose of a sanctions regime is to obtain compliance with the law. However, people's compliance behaviour is not shaped just by the potential sanctions they face. Also involved is the perception that the penalties are legitimate, and that they are administered fairly and impartially. In practice, as well, the administrative feasibility of a sanction comes into play. If it is too easy to apply, it may be used too readily; if it is too difficult to apply, it may be used erratically and unpredictably. In both cases, the sanction is unlikely to command the respect necessary to achieve voluntary compliance. Another range of factors in compliance behaviour relates to:

- how complex the rules are and how well they are understood; and
- whether people have access to expert advice on how to comply with the rules.

Efficiency of the compliance program

Another factor shaping compliance behaviour is how well the regulator administers the compliance program. The best designed sanctions in the world will not persuade people to comply unless the sanctions are used effectively and swiftly. To deter non-compliance, people need to know there is a high probability that non-compliance will be detected and that adverse consequences will follow promptly.

Matching the sanction to the non-compliance

The legitimacy of any sanctions regime requires acceptance that the sanction is appropriate to the act of non-compliance. This implies ranking both sanctions and forms of non-compliance according to severity and assuring an adequate match. It also involves finding a sanction that logically fits the type of non-compliance. If, for example, the type of non-compliance involves the abuse of official donation receipts, then the penalty probably should focus on the tax-receipting privilege. Or if the cause of the non-compliance is ignorance of the law, then probably any compliance effort should focus on ensuring that the charity is made aware of its legal requirements.

How much discretion should there be in selecting the sanction?

If more than one sanction is available, who should be responsible for choosing the appropriate penalty? On the one hand, a case can be made for leaving a good deal of discretion in the hands of the regulatory body so that it can tailor a remedy to fit the case. On the other hand, too broad a discretion leaves charities unsure of what the consequences of non-compliance will be, and opens up the possibility of disproportionate penalties. To avoid this, it might be better to specify the entire regime in detailed legislation that said if a charity does X, then the penalty is Y. However, the consequence of giving the regulatory authority no discretion as to which penalty to impose is that this authority would also lack discretion not to impose a penalty. If a charity does X, the regulatory authority would have to impose Y, even if there were compassionate or other grounds why the penalty was inappropriate. The proper balance must be found between regulatory discretion and clear, certain penalties.

What should be in the legislation?

Some may question whether it is even possible to spell out detailed sanctions in legislation. The skeptics will say that charity cases are almost always highly context-specific. Any legislative wording would have to be so general in nature that little certainty would be gained by the exercise. Also, charity law is continually evolving, and novel ways to abuse charitable status emerge regularly. This evolution results in the legislation being out-of-date.

To counter such arguments, others contend that it should be possible to devise statutory wording that lets charities know what they need to do. They would then at least have a list of all the requirements in one place, which they could periodically refer to as a self-check of their compliance status. Still, a remaining issue is how that list, once set in legislative stone, could be readily amended to match changing circumstances.

What sorts of sanctions are appropriate against charities?

There are a number of issues related to the types of sanctions that are appropriate for charities, especially sanctions involving financial penalties. Typically, financial penalties involve complex legislative provisions, with considerable administrative machinery required to administer them. There is also debate on whether financial sanctions should be levied against the obvious candidate, the organization in question. Against whom do you levy a financial penalty if the charity has no corporate existence (such as a charity constituted as an association)? Why hurt blameless beneficiaries by depriving a charity of funds that would otherwise be spent on charitable programs? But if instead you levy the penalty on the directors or managers, what will be the impact on the recruitment of good people to these positions?

Another issue peculiar to charities is the tremendous variability of the sector. What one charity would consider a serious penalty may have little effect on another. For example, an endowed foundation that is no longer issuing tax receipts would not be affected by a penalty dealing with the right to issue these receipts. But how many different penalties are necessary? And at what point does the system become bogged down in complexity?

Transparency and public opinion

Yet another characteristic of the charitable sector that has to be borne in mind is its sensitivity to public opinion. If a particular organization is damaging the sector's reputation, perhaps the regulator should be allowed to promptly address the problem. Yet, presumably, no one wants to see that organization's rights unnecessarily or improperly diminished.

Public reaction also affects how transparent a compliance program should be. If the public becomes aware that a charity is subject to a penalty, the charity's reputation will suffer. However, without transparency, accountability for the operation of the compliance program becomes difficult, and there is no way to reassure the public that an effective regulatory regime is in place.

Should deregistration remain?

If intermediate sanctions are introduced, will it be necessary to retain deregistration as a sanction? If so, should the existing revocation tax stay in its present form?

Who should impose a sanction against a charity?

If the regulatory body does this, then it is combining the roles of police, prosecutor and judge. If another body at arm's length to the regulatory authority takes on this responsibility, then what sort of body should it be? And should this arm's length body impose all sanctions, or limit its sphere to only the more severe sanctions, lest the regulatory authority become hamstrung by another layer of bureaucracy? What avenues of recourse should a charity have if it disputes the decisions of the regulatory body (or those of an arm's length body)? How, in short, do you balance fairness to charities with an efficient sanctions regime?

Federal and provincial roles

As the Ontario Law Reform Commission has noted, charities are caught between federal and provincial regulation. The issue of regulatory overlap or gaps between the systems needs to be addressed in the context of compliance. A given problem brought to the attention of the federal regulator might be more properly or effectively handled at the provincial level, or vice versa. In another situation, a charity may find itself with both provincial and federal regulators at its doorstep. Information-sharing, let alone a coordinated compliance program, between the various authorities is currently impossible because each is required to operate under conditions intended to protect a charity's privacy. But is this sufficient reason to duplicate compliance expenditures at both levels, and to place a charity in a form of double jeopardy?

Other regulatory bodies

Somewhat similar is the question of what the federal charities regulator should do if it finds evidence of criminal activity or breach of another statute, such as the federal *Competition Act*. Should it have the authority to bring the evidence to the appropriate authority, on the grounds that the sooner the problem is taken care of, the faster the potential damage to the charity, its beneficiaries and the sector's reputation will be repaired? Or should the regulatory authority continue keeping its dealings with charities confidential, at least until such time as it imposes a sanction?

Reform recommendations

The purpose of a sanctions regime is to obtain compliance with the law.

Charities vary enormously in their degree of sophistication, their asset base, sources of financing, field of activity and how they administer themselves. Given this variation, we do not believe that a fair and effective sanctions regime can be achieved that relies only on a single penalty. We also believe that deregistration, currently relied upon as the sole penalty, is too severe for most types of non-compliance.

Compliance programs include measures that offer encouragement and support. In developing our proposals, we have assumed that most charities want to meet their legal requirements. Therefore, we have emphasized the need for the regulatory authority to work with charities to inform them of the law and to develop solutions to problems as they occur. The focus is on remediation – on putting things right. The aim is to make a charity stronger, not to drive it out of existence.

We also believe the regulator should take a gradated approach to compliance. Some actions the regulator takes will have a more severe impact on a charity than others. Generally, we would expect the regulator to start with actions having the least negative impact and to resort to more severe forms of enforcement only if they prove necessary. However, as both the severity of the penalty and the discretionary latitude increase, we will also be proposing safeguards to ensure the penalties are applied properly.

During the consultations, commentators told us they liked the gradated approach to compliance, along with the emphasis we placed on remediation and education. However, a number of remarks suggested that the concept of "tiers" we had originally used was potentially misleading. The "tiered" approach seemed to imply, for instance, that the regulator would only provide education at the first step in the process, or that communications between an organization and the regulator to arrive at a reasonable result ("negotiation") would only occur at the second step.

To clarify, we need to distinguish between the activities a regulator engages in and the type of enforcement action that results from these activities. A regulator engages in many different activities, including fact-finding, education and negotiation. The outcome of these activities could be a number of things, such as a remedial agreement,[1] a public notice that a charity has not filed its annual return, a sanction of one sort or another, a deregistration, an annulment or a court order.

Table 3 provides a revised overview of our proposals.

Table 3

Overview of Proposed Compliance Program

Method of Enforcement	Purpose
REMEDIAL AGREEMENT	For the charity and regulatory authority to consider the charity's specific circumstances and work out together how a problem can be resolved, with a commitment from the charity to resolve the problem accordingly
PUBLICITY (charity's name is published on website)	To obtain compliance with the requirement to file an annual return, in a situation where the facts and law are self-evident, by enlisting the community to remind a charity of the legal requirements
SUSPENSION OF QUALIFIED DONEE STATUS (charity could no longer issue tax receipts for gifts, receive grants from charitable foundations) **FINANCIAL PENALTY ON CHARITY** (charity loses its tax exemption, with tax payable being up to 5% of previous year's revenue, or up to 10% for repeated infractions, plus up to 100% of amounts obtained in breach of requirements)	Both methods of enforcement have two purposes: (1) To obtain compliance, with the penalty being lifted once the charity meets the legal requirements (2) To provide a penalty for (and therefore deter) non-compliance, when the infraction is repeated, irreparable harm results or private benefit is present Penalty amounts to be re-applied to charitable purposes
DEREGISTRATION	To remove non-qualifying organizations from the register Replace existing revocation tax, to ensure assets are applied for charitable purposes

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[1] We are referring to what we called "negotiated settlements" in the interim report, but have changed the terminology to avoid confusion with the activity of negotiating, which we do not want to suggest should be used only in the context of these agreements.

Before looking more closely at these proposals, we want to make another important point. We have placed this chapter on Intermediate Sanctions in our report after the chapter on Appeals for a reason.

In considering how a compliance program for charities would work, we initially tried to list types of non-compliance and match them with appropriate penalties. This proved impossible. Generally speaking, there was too much variation in the acts of non-compliance and the circumstances of organizations to be able to closely tie a particular act of non-compliance with a specific penalty.[2] We identified two exceptions – not filing the annual information return and deceptive fundraising – where the pattern of non-compliance was sufficiently established that specific remedies could be considered.

In developing our proposals, we have consequently placed heavy reliance on the discretion of the regulator to produce an effective and just outcome. A large majority of those participating in the consultations endorsed this approach.

However, this discretion cannot be unfettered. In some places, we are suggesting a role for the ministerial advisory group. More importantly, given the powerful tools we are proposing be placed in the hands of the regulator, it is essential that charities have an accessible recourse system. **We do not believe the new intermediate sanctions we are recommending (suspension of qualified donee status and suspension of tax-exempt status) should be introduced without adequate recourse in the form we have recommended in Chapter 5.**

Giving charities the means to comply

Charities must know and understand what is expected of them. Also, they should feel comfortable seeking guidance from the regulator when they are uncertain as to how to proceed. The regulator needs to:

- provide plain-language publications setting out the law;
- organize information sessions;
- promptly provide oral and written responses to questions posed by charities; and
- meet with individual charities at their request.

Charities need to know that they will receive correct information from the regulator and that they can come to the regulator for a frank discussion of problems. We propose that the regulator establish and publicize a policy emphasizing that its role is to help charities comply with the law. Also, the policy must ensure that the regulator, to the extent that its discretion allows, will treat charities leniently when they disclose their problems to the regulator and work with it to resolve the difficulty.

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[2] For example, the law requires a charity to issue official donation receipts containing certain information. This requirement would be infringed if a receipt did not contain the statement that it was "an official donation receipt for income tax purposes." It would also be infringed by an inadvertent mistake in filling out the amount of the gift on one donation receipt. Again, it would be infringed if an employee inflated the amount on two receipts issued to family members. And the same infraction would occur if a charity had been systematically inflating the amount of the donation on all its receipts over a period of years, after having been previously warned to desist. We believe each of these situations requires a different regulatory response.

However, the regulator cannot be expected to handle an educational support role single-handedly. The sector can help by developing networks of charities. The networks would bring charities together to share their knowledge and offer opportunities for the more experienced to offer guidance to the less experienced. We also recognize the need for courses, at community colleges and elsewhere, on the role of directors/trustees and on charity law.

What we heard

Education was such a pervasive theme in the consultations that we have addressed the issue more fully in Chapter 3. During the consultations, participants often referred to the turnover in volunteer board members and the resulting need for education to be provided on an ongoing basis. They also urged that information should be easily obtainable and readily understandable, with many pointing to the regulator's website as a place where plain-language instruction would be invaluable.

Our conclusions and recommendations

Although we have made recommendations on education in Chapter 3, we believe it worthwhile to signal education's importance to a compliance program by making separate recommendations in this context.

Recommendations

57. **The regulator should undertake a program of continuing education designed to provide charities and their volunteers with the knowledge they need to comply with their legal requirements.**
58. **The regulator should review its website from the perspective of someone new to the field and design education modules that convey essential information in language that is easy to understand.**
59. **The regulator should establish and publicize a policy that its role includes helping charities comply with their legal requirements and that it encourages voluntary compliance through working with charities to resolve problems that are disclosed to it.**

Remedial agreements: working with charities to correct a problem

Apart from education and support, remedial agreements[3] should be a prominent part of the regulator's compliance program. Assuming that virtually all charities wish to comply with the law, these settlements should be sufficient to solve the problem in the vast majority of cases.

The core idea is to obtain agreement between the regulator and an organization about the nature of the problem, what would put it right, and how to prevent it from happening again. "Nature of the problem" includes the facts and the application of the law to those facts, as well as the reasons why the problem arose. Solutions must vary according to the circumstances at hand. Indeed, if solutions are to be effective, they must reflect the unique circumstances of the case. Such a procedure is modelled on that used in the United States and represents a development from the Charities Directorate's existing practice of obtaining a charity's written promise to correct a problem.

Both the regulatory authority and the charity should treat remedial agreements as a mutual problem-solving exercise. As the two sides put their heads together, creative ways of resolving a given problem will surely emerge. If necessary, they could agree to use an outside facilitator to help reach an agreement. The regulator should keep track of the various corrective and preventive solutions, evaluate their effectiveness, and develop a list of workable ideas for use in future settlement discussions.

Our conclusions and recommendations

We heard strong support during our consultations for the use of remedial agreements. One question that came up is whether such agreements could contain a financial settlement. Our view is that financial settlements should not form part of remedial agreements. Under such an agreement, a charity might agree to undertake certain things, such as seeking professional accounting advice, that it would have to pay for, but it should not be asked to make a payment either to the Crown or another charity. In our view, any such payments should only be made in the context of a sanction legislated by Parliament, and payments like these need to be open to public scrutiny. Given the power imbalance between the regulator and an individual charity, we believe there is too much danger of an unjust result to allow closed-door deals involving a financial settlement.

A concern that was voiced was the need to provide some degree of transparency to remedial agreements, even if no financial settlements were involved. For reasons explained more fully later in this chapter, we believe that such agreements should remain confidential. However, we have always recognized that accountability is necessary in this area to ensure public confidence. Thus, we are not only recommending that the regulator provide details in its annual report of the program (without identifying the charities involved), but also that the ministerial advisory group monitor the use of remedial agreements.

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[3] See footnote 1 earlier in this chapter.

Recommendations

60. The regulator should develop policies supporting the practice of seeking remedial agreements with non-compliant charities, but such agreements should not include a financial settlement.

61. The ministerial advisory group should monitor the fairness of the policies surrounding remedial agreements.

Handling charities that do not file their annual return

Remedial agreements attempt to solve problems that are specific to particular organizations. However, this is not a cost-effective approach to types of non-compliance that:

- occur frequently, despite the regulator's educational programs; and
- involve matters of fact and law that are not open to interpretation.

A good example of this type of non-compliance is failing to file the required annual information return. The law states that such a return must be filed, and either a charity did or it did not file the return. Some 2,000 charities are not filing their returns each year, despite a vigorous program of deregistering them for failing to do so.

The CCRA currently has no other practical means of enforcing the filing requirement short of deregistration. However, deregistration for active charities seems to be both overly severe and administratively unwieldy. Once deregistered, these charities have to re-apply for registration. This ensures the repeat applicant meets current registration standards, but the application process is being used, inappropriately, as a form of penalty. Moreover, handling re-applications creates an additional burden on the system.

We suggest that the regulator should initially use publicity, without first seeking a negotiated settlement, to handle non-filing of annual returns. When the names of non-compliant charities are published, pressure from the local community would serve as a reminder to the charity of its legal obligations. Publication could be on the regulator's website, in a local newspaper, or both.

The regulator should telephone the charity and send it a written warning at least a month before the charity's name is published. No further action would be taken if the charity sends in its return before the date stated in the warning. If the charity has failed to advise the regulator of a change of address or phone number, so that it does not receive advance warning, then the charity is responsible for the lack of warning.

On the regulator's side, system accuracy and frequent updating would be necessary. Ideally, a defaulter's name should be removed from the list within a day or so of the return having been received and accepted. Procedures would also be needed to correct quickly (and publicize the correction of) any errors that occur in the listing.

If publishing the charity's name does not correct the problem, the regulator can decide to proceed to more serious forms of enforcement action.

What we heard

Our interim proposal – that the names of non-filing charities be publicized as a way of encouraging compliance with the filing requirement – attracted a lot of comment. Most endorsed the proposal, but cautiously so, given the potential damage to a charity's reputation that could result. Some pointed out that publishing names of non-compliant charities in local newspapers would be expensive, while others noted that non-filing organizations would typically not include those who checked the regulator's website regularly, if the listing were to be published there.

We also received other suggestions on the treatment of non-filing charities. One was to charge the charity a fee if it sought re-registration after having lost its original registration for failure to file. Respondents argued that a monetary impact would be more effective in inducing charities to file on time than the inconvenience of having to apply over again.

Our conclusions and recommendations

On balance, we believe the best approach is for the regulator to proceed with listing non-filing charities on its website, with a notice indicating the regulator intends to deregister the charity unless the annual return is received before a specified date. This listing, while public, is less likely to come to the notice of the general public and thus less likely to be damaging to the charity. At the same time, it allows those deciding whether they want to support an organization to check out its filing status, and it provides umbrella groups and other interested persons with the means of alerting the organizations at risk of losing their registration.

We agree that a re-registration fee would also encourage charities to file their returns on time. Therefore, we are proposing that an application for re-registration would have to be accompanied by a payment of $500. We would give the regulator the discretion to waive some or all of the fee where appropriate.

Recommendations

62. **The regulator should publish on its website a list of charities that are under imminent threat of sanctions because they have not filed their annual return.**
63. **A fee of $500 should be charged to charities applying for re-registration after having been deregistered for failure to file their annual return, with the regulator having the power to waive the fee, in whole or in part, where appropriate.**

Intermediate sanctions: penalties and inducing compliance

In our interim report, we identified three types of intermediate sanctions:

1. Suspension of a charity's status as a "qualified donee" under the *Income Tax Act*. While suspended,
   - the charity could not issue tax receipts for the gifts it receives;
   - other charities could not make gifts to it; and
   - people making a gift to the charity could not claim a tax benefit on the basis of their gift.

2. A financial penalty on an organization because it has temporarily lost its tax-exempt status. The tax payable would be up to 5% of the charity's previous year's revenue[4] for first infractions, and up to 10% of this amount for repeat infractions.

3. A financial penalty on individuals connected with a charity in certain circumstances. The circumstances appropriate for this sanction could include obtaining an inappropriate benefit as a result of their influence over the charity, or approving expenditures they know to be non-charitable. The interim report suggested a penalty equal to the amount of the benefit or expenditure, plus 25%.

We took the view that different sanctions are required to handle a variety of circumstances. A financial penalty on a charity, for example, would be of no use against a penniless organization. Nor would it be meaningful to suspend the qualified-donee status of a foundation that is no longer issuing tax receipts. And if individuals rather than an organization are responsible, then in our interim report we suggested that it might be appropriate for the penalty to fall on them rather than the organization. As will be seen below, we reconsidered this third type of sanction following the consultation process.

Suspending qualified donee status is a novel sanction. It has a number of advantages, not the least of which is its logical fit with a federal regulatory regime based on the *Income Tax Act*. However, this sanction is difficult to enforce.

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[4] In our interim report, we referred here to "income." However, the correct term is "revenue," as was pointed out to us during the consultations.

As a first step, the regulatory authority should publicize the names of suspended charities, with a warning to potential donors and granting charities. This would enlist the community to monitor the situation, and enable granting charities and donors to quickly check the status of charities that they are considering funding. The charity involved would also have to inform granting charities and donors of its suspended status before accepting any gift.

The regulatory authority should also investigate the possibility of obtaining control over tax receipts, and such a system should be adopted if it is feasible. "Control" implies a system under which the regulatory authority can track the organizations that are issuing receipts and which can effectively prevent an organization from issuing receipts if the organization is suspended.[5] Such a system would also address the CCRA's existing problems with counterfeit receipts issued by never-registered groups, and deregistered organizations continuing to issue receipts.

This sanction could be reinforced by imposing a financial penalty on charities that continue to issue tax receipts while under suspension. The regulator would also have the option of proceeding to deregistration if a suspended charity continued to issue receipts despite warnings to stop.

After notice that the regulatory authority intends to impose a suspension, the organization would have 60 days[6] to decide whether to seek recourse. If the organization decides not to seek recourse, suspension would go into effect at the start of the first quarter after the 60-day period expires.

Financial penalty on charities. Conceptually, this penalty results from the loss of the organization's tax-exempt status. However, we believe that a charity's pattern of revenue and expenses are different from those of other taxable entities. It would be difficult, for example, for a charity to deduct much in the way of expenditures made for the purpose of earning income. Therefore, the suggestion is that the tax payable be set at up to 5% of the organization's revenue obtained from all sources in the previous year. Even if the organization has engaged in several forms of non-compliance, the penalty would remain at most 5%. However, if the organization subsequently repeats the same form of non-compliance, the penalty could rise to 10%.

After notice that the regulatory authority intends to impose a financial penalty, the organization would have 60 days to decide whether to seek recourse. If the organization decides not to appeal, the penalty should become payable at the beginning of the first quarter after the 60-day period expires. The penalty would be payable quarterly. For example, if a total penalty of $10,000 were imposed, $2,500 would be due at the beginning of each quarter.

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[5] Several mechanisms for controlling receipts have been proposed. For example, for paper receipts, the regulatory authority could issue the blank receipt books itself or license their printing (as banks authorize the printing of cheque books). For receipts a charity issues electronically, it may be possible to flow the transaction through a "gate" maintained by the regulator.

[6] We had originally proposed that an organization have only 30 days in which to decide whether to seek reconsideration. However, during the consultations we heard that 30 days was in practice too short a time for charities to make decisions of this nature. We are now suggesting that charities should have 60 days to decide how to proceed.

We are concerned that, wherever possible, charitable beneficiaries not be harmed by any financial penalty. Therefore, we suggest that the money collected in penalties be turned over to charitable purposes. Various ways of doing this are possible. For example, the regulator might apply to the court system for a determination of where the money should go, with the court selecting a charity or charities from the same geographic area and with similar purposes as that of the penalized charity. This procedure is probably too complex where relatively small amounts are involved, and so we suggest that, if less than $1,000 is involved, the money should simply be payable to the Government of Canada.

Financial penalty on individuals. The existing *Income Tax Act* measures that encourage compliance are not always effective in ensuring compliance by individuals who have significant influence over a registered charity's affairs. Allowing a financial penalty on directors, trustees, and certain employees of a charity could provide the regulator a more flexible and effective range of sanctions by focusing on specific individuals as well as the charity. As well, such a penalty has the advantage of not taking money from the charity itself.

Financial penalties on individuals are not intended to replace the *Criminal Code.* If a crime has been committed, then it should be prosecuted as a crime. Rather, we see certain fact patterns where these financial penalties might be useful. For example, a manager of a charity also owns a fundraising company. The charity awards a contract to this company and funds are raised in the name of the charity. However, the company retains virtually all of the money. Another example would be the case where a charity that has had its qualified donee status suspended continues to issue donation receipts, and the directors do nothing to correct the situation.

Generally, we would expect that only individuals who participated in the activity, agreed to it, or were negligent would be penalized. Penalties could be based on the value of the funds wrongly disbursed plus an amount of up to 25% of those funds.

After notice that the regulatory authority intends to impose a financial penalty, the individual would have 60 days to decide whether to seek recourse. If the individual decides not to appeal, the full amount of the penalty would become payable once the 60-day period expires.

As with financial penalties on charities, we suggest that any amounts over $1,000 collected in financial penalties on individuals be re-applied for charitable purposes. However, if a charity has suffered harm from the actions of the penalized individuals, it should be allowed to present a case for the penalty amount to be paid over to it. The regulatory authority may choose to contest this if it has evidence that the charity was negligent or partly responsible for the non-compliance.

Selecting the intermediate sanction. We have concluded that selecting the sanction to be imposed should be left up to the regulatory authority. It will often be obvious which is the most appropriate sanction. Where there is doubt, such as between suspending qualified-donee status and imposing a financial penalty on an organization, we suggest that suspension is preferable because it does not take funds the charity has already collected from the public.

We also suggest allowing the regulatory authority to apply more than one of the intermediate sanctions at the same time. Certainly, it is possible to foresee circumstances where both the organization and individuals are equally to blame for the non-compliance. There may even be rare circumstances where both suspending an organization's qualified-donee status and imposing a financial penalty on it are called for, such as a charity that is again abusing its tax-receipting privilege and has previously received a suspension for this reason.

Application of the intermediate sanction. These sanctions can serve two different purposes – as an inducement to comply and as a penalty.

As an inducement to comply, the sanctions are intended to persuade organizations to comply with the law. A charity would be able to avoid the sanction entirely if it satisfied the regulatory authority that it had corrected the problem before the date the sanction was due to go into effect. Once the sanction has gone into effect, it would run for a year, but the sanction could be lifted earlier if the charity complied at some point during the year.

However, we believe these sanctions should be used as a **penalty** in the following circumstances:

- in the case of repeat offences, where the message that the charity must meet its legal requirements needs reinforcing;
- where the harm done to beneficiaries and public confidence in the sector cannot be undone; and
- where charitable status has been abused to the private advantage of individuals or to the damage of the public treasury.

As a penalty, a sanction on an organization would be imposed for one year. It would continue to run even if the organization corrected its problems in the course of the year. There would be no ability to avoid the penalty.

Recourse. The procedures described in Chapter 5 for registration and deregistration decisions would also apply to the regulatory authority's decisions to impose intermediate sanctions. The individuals and charities affected could seek recourse by way of internal administrative review and afterwards from the court. The effect of seeking recourse would be to delay the imposition of the sanction.

We have some concern that recourse procedures not be used to unduly delay the application of justifiable sanctions. This is limited to some extent by the requirement proposed for all recourse procedures, that those affected indicate their intention to object within 60 days and that the internal administrative review is completed within 60 days, unless both parties agree to extend the process. Also, as discussed below, the regulatory authority would have the option of seeking an injunction from the court in cases where an individual's or an organization's ongoing non-compliance was creating irreparable harm.

What we heard

Suspending qualified donee status. Some commentators opposed this intermediate sanction as potentially having too severe an impact on an organization. However, two umbrella groups felt that the willingness of people to give to a cause even without tax receipts and the existence of reserves would enable an organization to continue through the period of suspension. A somewhat larger number supported the proposal unconditionally. However, the largest group of all, while admitting the sanction was conceptually attractive, had questions or doubts about its administrative feasibility.

Suspending tax-exempt status. Opinion on this sanction was divided. Most of those who opposed argued that its impact could be too severe. Again, some umbrella groups felt that a charity's reserves would carry it through the suspension.

One observer took a different perspective, in noting that even 5% of revenue might not cover the amount that a charity obtained as a result of breaching a legal requirement, such as by carrying on an unrelated business.

Some questioned whether the federal government could or should "tax" government grants and suggested that only receipted income be subject to the tax.

The idea of re-applying the monies raised by the tax to charitable purposes was unanimously supported. There was some suggestion that all amounts should be treated the same way, and not just those of over $1,000 as we proposed. While we did not specify how these monies should be re-applied, about a third of the participants suggested that they should be paid into the fund, proposed in Chapter 5, to subsidize certain appeal cases.

Financial penalties on individuals. We specifically asked during the consultations whether we should also recommend a financial penalty on individuals who abuse a position of influence in a charity's affairs.

Opinion on this proposal was sharply divided. Those opposing it did so primarily because:

- it would have an adverse impact on charities' ability to recruit volunteers and staff;
- other legislation like the *Criminal Code* already has adequate provisions to check abuse;

- it would be difficult to draft in legislation and to administer; and
- the primary responsibility for checking abuse lay with charities and the community.

Nevertheless, an equal number of participants endorsed the proposal, either outright or under certain conditions, such as the availability of a due diligence defence. We received relatively little guidance in specifying the type of misbehaviour that should attract a financial penalty on an individual. Many questions were raised, such as how the line between acceptable and unacceptable benefit would be drawn, and how responsibility should be allocated between full-time staff and volunteer board members.

Our conclusions and recommendations

Suspending qualified donee status needs to be accompanied by a system that would enable the regulator to track the issuing of official donation receipts. Any such system, it goes without saying, should not impose an undue burden on the great majority of charities that are complying with the law. But if such a system could be devised, it might provide the answer to a number of compliance issues, including:

- the non-filing problem (no annual return, no tax receipts); and
- the problem to be addressed below of deceptive fundraising campaigns.

Thus, we reinforce our original recommendation that the regulator pursue research into developing such a system by urging that a report on the subject be submitted to the ministerial advisory group within two years.

We still believe that this sanction should be implemented without waiting for a system for controlling receipts. We have suggested back-up measures the regulator can take to promote compliance with the sanction. While a number of technical questions remain to be worked out, these do not appear to be insurmountable.

We continue to see **suspending tax-exempt status** as a necessary component of an intermediate sanctions program. Charities that do not rely to any great extent on fundraising would be little affected by suspending their qualified donee status. Suspending tax-exempt status provides a sanction that would affect them. We would also add that the regulator, in developing policies on what level of tax to impose, would need to keep in mind what an organization can reasonably afford to pay.

We acknowledge that, in some circumstances, a charity that is breaking the rules may gain more than it would lose under our interim proposal. Therefore, we propose that the tax be set as a percentage of total revenue plus up to 100% of revenue obtained as a result of a breach of a legal requirement under the *Income Tax Act*.

As to the suggestion that only receipted income should be taxable, a major reason for proposing this sanction is to provide an effective deterrent to organizations that rely on sources of revenue other than donations. We would also point out that the proposal is not to tax government grants, but to tax an organization. Further, in our view it is fully within the competence of the *Income Tax Act* to determine which organizations should and should not be tax-exempt.

We continue to believe re-applying monies to charitable purposes should only apply to amounts over $1,000. Our thinking remains that the procedure is probably too complex for relatively trivial amounts. However, we are sympathetic to the view that charitable dollars should stay within the charitable sphere, and so we would suggest that the subject be re-visited once some experience with the procedure has been obtained.

Our interim report did not propose any particular mechanism for re-applying the monies to charitable purposes. However, we do not think they should be paid into the appeal fund because this does not respect the purposes for which the monies were originally received. Instead, we are now proposing that the amount should be transferred to the regulator, which would then redirect it to one or more existing charities that are selected by the original organization according to its own dissolution clause and that are approved by the regulator. The regulator's consent is necessary, we believe, to ensure the amount is passed to an unrelated charity that is free of compliance problems. If the regulator and the charity cannot agree, then the regulator should seek the court's direction.

We are not ready to recommend introducing **financial penalties on individuals** in Canada. The consultations raised unanswered questions, and opinion was sharply divided. As well, the United States has had difficulty implementing its sanctions against excess benefit. We still believe there may be a role for such penalties, but further work is required to specify more closely the type of abuse that would require this type of penalty to check.

Recommendations

64. Assuming an adequate recourse system in the form we have recommended is in place, suspension of qualified donee status should be introduced as an intermediate sanction, with a requirement that a charity so suspended be obliged to notify donors and other charities of its status prior to accepting any gift from them.
65. The regulator should conduct research into the feasibility of a system to control the issuing of official donation receipts and report its findings to the ministerial advisory group within two years.
66. Assuming an adequate recourse system in the form we have recommended is in place, suspension of tax-exempt status should be introduced as an intermediate sanction, with the tax being set at up to 5% of the charity's previous year's revenue from all sources, or up to 10% of this amount for repeated cases of non-compliance, plus up to 100% of the revenue obtained from activities in breach of the requirements of the *Income Tax Act*.
67. Any monies raised from suspending tax-exempt status (amounting to more than $1,000) should be re-applied to charitable purposes, by being transferred from the regulator to another charity, as agreed upon by the regulator and the charity under suspension and in accordance with that charity's dissolution clause, or otherwise upon the direction of the court.
68. Financial penalties on individuals should not be introduced as an intermediate sanction at this time.

Deregistration

In our view, deregistration must remain as a last-resort sanction when all other compliance actions have been unsuccessful, or when the non-compliance is of a particularly serious nature and not capable of remediation.

Recourse, in the case of a proposed deregistration, would follow the procedures described in Chapter 5.

However, we believe the existing revocation tax is flawed. It is unjust because of its disproportionate impact on some charities depending on their funding sources and the type of assets they hold. Further, as an attempt to protect tax-subsidized donations from being diverted to non-charitable uses, the revocation tax is only loosely connected to this objective. We have considered several reformulations of this tax, and found none to be satisfactory.

Instead, we believe the best approach is that recommended by the Ontario Law Reform Commission in its *Report on the Law of Charities* (1996: 378):

> If deregistration is applied as a penalty, then the one hundred percent penalty tax should be imposed in a way that ensures compliance with provincial *cy-près* law. There should also be some type of interim sequestration or receivership intervention available to [the CCRA]. In both cases – deregistration and interim sequestration – [the CCRA] should cede jurisdiction as soon as possible to the relevant provincial authorities.

The existing provisions for "voluntary revocations" should remain largely unchanged. These are requests by a registered charity that its registration be revoked. They occur when an organization is ceasing operations so that any remaining assets should pass according to the dissolution clause in its governing documents. Such clauses are checked before registration to ensure that any remaining assets will continue to be applied for a charitable purpose. Nevertheless, the charity should be required to file a return with the regulatory authority, showing it has properly disposed of its assets. Where there is any question in this regard, the regulatory authority could seek an appropriate order from the court to direct the proper disposition of the assets.

It is unfortunate that a charity regulator must also occasionally deal with people who are less than honest, and whose actions potentially bring the sector into disrepute. Once the regulator is made aware of a potentially serious problem (for example, by a call from the local police), it has to go out and gather the evidence of such serious non-compliance as would justify deregistration. Often the organization has not done anything that would clearly put it in breach of the legal requirements; it has simply been collecting money from the public.

The first clear-cut act of non-compliance comes when the organization cannot meet its disbursement quota, which usually falls some 30 months after registration. Add in the various delays for notices and establishing a date for the hearing, and another year could pass. At this point the organization (along with the money) typically disappears. It then re-applies under a different name, with different people named as directors, and with an application that would arouse no suspicion.

To counter these cases, it may be useful to add another reason for deregistering a charity – that the registration was obtained on the basis of false or misleading information supplied by the organization in its application for registration. This measure would encourage everyone to take the application process seriously, but it is intended specifically to deal with organizations that use little or none of the funds they collect from the public for charitable work, and whose application for registration misleads both the public and the regulatory authority. Under the proposal, the regulatory authority would not need to establish the existence of non-compliance with the conditions for registration, only that the registration was obtained on the basis of false information. The organization concerned would have the usual means of recourse.

Sometimes the regulator will see the same individuals who ran one registered charity off the rails turning up at its door with a fresh application. While naturally suspicious, the regulator may have no legal reason to reject the application. The second organization then goes astray and is eventually deregistered. To handle these situations, one possibility is to introduce a requirement that a charity cannot become or remain registered if a person occupying an influential position within the charity has, within the past five years, been convicted of fraud involving a registered charity or has been subject to the financial penalty on individuals, discussed above as a possible intermediate sanction.

What we heard

There was no disagreement with our interim conclusion that deregistration had to remain in the regulator's toolkit as the ultimate sanction. As to what to do with the existing revocation tax, we received only a few comments. About half supported our tentative endorsement of the proposal of the Ontario Law Reform Commission in its *Report on the Law of Charities*. Others felt the procedure was too cumbersome. These respondents favoured instead either that the assets should be distributed according to the organization's dissolution clause or that they should be paid into the appeal fund or a foundation for the general support of charities.

No opposition was voiced to our first proposed mechanism to tackle deceptive fundraisers – that obtaining registration on the basis of false or misleading information become a new reason for deregistration. A couple of commentators pointed out that an equivalent mechanism is already found in other parts of the *Income Tax Act*.[7]

Virtually every commentator also strongly approved our second proposal – that no person occupying a position of influence in a charity should, within the last five years, have been convicted of fraud involving a charity or been subject to the financial penalty on individuals that we had outlined in the interim report. Some went beyond our proposal, calling for various extensions such as a public database of non-qualifying individuals. Several commentators suggested that the model of security exchange commissions barring individuals from trading be adapted to bar unethical persons from serving with other charities.

Our conclusions and recommendations

We confirm our original recommendation calling for the retention of deregistration as the ultimate sanction against a non-compliant organization. We also confirm our call for a reformulation of the revocation tax, although we are aware that further work needs to be done in this area. We continue to believe, however, that the

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[7] See, for example, subsections 125.4(6) and 125.5(6) on films ("an omission or incorrect statement was made for the purpose of obtaining the certificate"), and subsection 149.1(6.5) on national arts service organizations ("an incorrect statement was made in the furnishing of information for the purpose of obtaining the designation").

Ontario Law Reform Commission proposal has merit, particularly in that it recognizes that jurisdiction over charitable property rests with the provinces.

We also confirm our suggestion that obtaining registration on the basis of false or misleading information should become a new reason for deregistration.

However, we have reconsidered the proposal to bar charities from registration if certain non-qualifying individuals occupy a position of influence within them. It is not simply that we are recommending against proceeding at this time with one of the proposed reasons for disqualification (the individual has been subject to a financial penalty). Rather, we have become increasingly hesitant about the equity of and federal jurisdiction for, in effect, barring people from employment in or volunteering for charities. We do not think that federal jurisdiction would extend to something like the trading bans used by security exchange commissions. We are now proposing that the regulator be given the means to address the problem somewhat more directly (see the section on Orders later in this chapter).

Recommendations

69. Deregistration should remain the ultimate sanction available to the regulator, but the revocation tax should be reformed in accordance with the principles set out in the Ontario Law Reform Commission's *Report on the Law of Charities*.

70. An additional ground for deregistration should be introduced: cases where the registration was obtained on the basis of false or misleading information supplied by the applicant.

Special case: annulments of registration

There are two related matters that are best considered separately. First are annulments. Annulling a registration means treating it as if it had never occurred. The power to annul a decision is inherent in any regulatory body as a means of correcting a decision made in error. However, it would be advisable to spell out in legislation (or regulations), the situations where annulment is justified. This would give a legislative basis for the CCRA's practice of not attempting to reclaim any tax advantages obtained by either the organization or donors during the period before the error is discovered. It could also provide a recourse mechanism.

In cases of annulment, we suggest that the current practice of not applying the revocation tax (or its replacement) should continue.

We propose that annulment of a registration be possible in cases where the registration was approved:

- as a result of an administrative error; or
- as a result of an application submitted in innocent error by an organization.

An example of the second instance would be where a subordinate entity mistakenly obtains independent governing documents and applies for registration on the basis of them, when the constitution of its parent body does not permit the creation of independently established units within itself.

According to existing practice, annulments are consensual, and it may be desirable to make this a requirement in the legislation. However, if the organization disagrees with the regulator's assessment that it is not and has never been a charitable entity, currently it has no direct avenue of recourse.[8] The organization should have access to the recourse system to argue that it is indeed a charity.

All organizations that are under deregistration proceedings should also be allowed to use the recourse system to argue that they should not be deregistered, but rather their registration should be annulled because they never "ceased to comply" with their legal requirements and the regulator erred in initially granting them registration. Whether or not it makes its case, the organization will no longer be registered, but if it obtains an annulment it will not be subject to the revocation tax (or its replacement).

Our proposal that the reasons for annulling a registration be spelled out in the legislation attracted little comment during the consultations. However, the question was raised as to how to treat charities that, at some point after being correctly registered, cease to be charitable owing to changes in the law or policy. We believe this raises a valid issue, but do not think that annulment is the proper response since annulment implies the registration was void from the start. Instead, the regulator could resort to the other way of ending a registration already mentioned in subsection 149.1(15) of the *Income Tax Act* and "terminate" the registration as of the date the organization ceased to be charitable.

Recommendations

71. The legislation should specify the following grounds for annulment:
(a) where the registration was approved as a result of administrative error; and
(b) where the registration was obtained as a result of error on the part of the applicant.

72. The legislation should specify the grounds for terminating a registration, including the loss of charitable status as a result of changes to law or policy.

73. An organization under deregistration proceedings should be allowed to appeal on the grounds that its registration should be annulled or terminated rather than revoked.

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[8] The organization has only an indirect means of recourse. It could refuse to accept the offered annulment, wait until the regulatory authority deregisters it, and then appeal the deregistration.

Special case: orders

The second related subject involves the use of injunctions by the regulatory authority. Occasionally, the regulator is confronted with situations where immediate action is needed to protect the public interest or to prevent the loss of tax-assisted charitable assets. The actual or potential harm is of sufficient magnitude and irreversibility as to justify the regulator seeking a court injunction to curtail the damage until the matter can be sorted out under normal procedures.

This power already exists, although in undefined form. We propose giving a judge of the Federal Court Trial Division the power to issue such orders, and legislatively defining "public harm" to include situations where there is reason to believe that:

- tax-subsidized donations from the general public are not being applied for charitable purposes; or
- the general public is being misled to believe that they can use their contributions to claim a charitable tax benefit, or that their contributions will be used for a charitable purpose.

No opposition to these proposals emerged during the consultations. Some commentators specifically pointed out that, while a recourse system with its inevitable delays was a necessary component of the compliance program, there were certain circumstances where immediate action was needed. These circumstances included deceptive fundraising. We agree, and accordingly would specifically include the immediate suspension of a charity's qualified donee status among the measures the court could order. This would have the effect of putting a stop to the collection of tax-assisted donations until the organization's status as a charity could be established.

To clarify, we are recommending that such orders be *ex parte* orders. That is, the order would be issued without the need for the organization to be present in court.

Recommendation

74. Where a judge of the Federal Court Trial Division has reasonable grounds to believe a registered charity is causing significant and irreversible public harm, he or she may issue an *ex parte* order to immediately suspend the charity's status as a qualified donee, impose such other measures to prevent the harm as are warranted by the circumstances, or both. "Public harm" should be defined to include using tax-subsidized donations for non-charitable purposes, and misleading the general public that they can use their contributions to claim a charitable tax benefit, or that their contributions will be used for a charitable purpose.

Spelling out the requirements in legislation

In our view, certain of the requirements for registration are not spelled out clearly enough for charities (or even the regulatory authority) to easily understand the law.

We recommend deleting all the specific reasons for deregistration contained in the *Income Tax Act*.[9] Instead, there should be one general reason for deregistration – failure to comply with the requirements for registration as a charity.[10] Then, a separate section should provide a complete, plain-language listing of what these requirements are, including:

- to be resident in Canada;
- to file a return;
- to maintain proper books and records;
- to meet the disbursement quota; and
- to issue tax receipts properly.

To permit the legislation to adapt quickly to any new abuses, it should allow new requirements for registration to be introduced by regulation, although only within sufficiently specified areas, such as with regard to private benefit. Specifying areas where regulations could be used would eliminate the possibility of undue discretion on the part of the regulatory authority in identifying compliance issues.

Regulations could also be used to clarify some of the requirements (for example, by defining what "resident" in Canada means). However, if the government wishes to introduce any new conditions that specifically call for deregistration as the consequence for non-compliance, our view is that this should only be done by amending the legislation itself.

This proposal represents more than a cosmetic change. First, many of the current specific reasons for deregistration (such as carrying on improper business activities, not meeting the disbursement quota, not keeping proper books and records, not filing the annual return, or issuing tax receipts improperly) are all forms of non-compliance

[9] The following summarizes the specific reasons for deregistration listed in the Act.

Provision	Applies to	Reasons for deregistration
149.1(2)(a)	Charitable organizations	Carrying on an unrelated business
149.1(2)(b)	Charitable organizations	Not meeting disbursement quota
149.1(3)(a)	Public foundations	Carrying on an unrelated business
149.1(3)(b)	Public foundations	Not meeting disbursement quota
149.1(3)(c)	Public foundations	Acquiring control of a corporation
149.1(3)(d)	Public foundations	Incurring impermissible debts
149.1(4)(a)	Private foundations	Carrying on any business
149.1(4)(b)	Private foundations	Not meeting disbursement quota
149.1(4)(c)	Private foundations	Acquiring control of a corporation
149.1(4)(d)	Private foundations	Incurring impermissible debts
149.1(4.1)	All charities	Inter-charity gifting to avoid failing to meet disbursement quota
168(1)(b)	All charities	General provision: not meeting requirements for registration
168(1)(c)	All charities	Not filing annual return
168(1)(d)	All charities	Issuing improper donation receipts
168(1)(e)	All charities	Not keeping proper books and records

[10] This does not mean that ignoring any particular requirement would lead to automatic deregistration, but rather that the regulatory authority could decide as a last resort to deregister for non-compliance with any of the listed requirements.

that would be more effectively and appropriately dealt with by methods short of deregistration. Second, by singling out some types of non-compliance for special mention, the Act seems to say that these are the most serious breaches of the law, when in fact other types of non-compliance (such as conferring a private benefit or ceasing to operate in an exclusively charitable manner) may be more significant. Third, the *Income Tax Act*, as it is currently structured and worded, stands in the way of an effective compliance program. With all the requirements for registration in one place and the meaning of each provision made clear, charities would better understand what is expected of them.

Further simplification of the legislation may also be achievable by deleting certain existing penalties faced by charities and letting the problem be handled by the proposed intermediate sanctions. For example, one of the provisions that could potentially be removed is the penalty against inter-charity gifting when used to evade the disbursement quota (ss. 188(3) and (4)).

Many other penalties in the Act target forms of non-compliance that charities may be implicated in, but are not exclusively directed at charities. These include:

- improper disposition of ecological or cultural property (ss. 207.3 and 207.31);
- misrepresentation by third parties in tax planning arrangements (s. 163.2); and
- failure to remit source deductions (ss. 227.1(1)).

In our view, it would be difficult to justify treating charities differently from others in regard to these penalties, which are designed to target specific infractions.

There was general agreement during the consultations that the existing legislation needs clarification.

Recommendation

75. The *Income Tax Act* should be revised to more clearly state certain basic provisions (as described in the text of the report) for obtaining and retaining registered status.

Coordinating the compliance regime with the work of other regulatory agencies

The regulatory authority's mandate currently extends only to the *Income Tax Act*. What then should it do if its investigations disclose evidence that an individual connected with a charity is engaged in fraud or another offence? What if these investigations strongly indicate that the charity itself is in breach of a statute (such as the *Competition Act*)? In our view, the answer is to allow the regulatory authority to disclose the evidence to the appropriate authority. Problems like this will almost always come to public attention anyway, and it is better for all concerned, including the reputation of the sector as a whole, that they be addressed.

More difficult is the case of what to do if the federal regulatory authority's investigations reveal a problem that falls partly or wholly within provincial jurisdiction as in the case of deceptive fundraising.[11] There is a good deal of overlap between federal and provincial roles, and the public is unclear which authority has responsibility for what. We suggest that public confidence in the sector is not helped by this lack of clarity. Charities also are often uncertain about the roles of the federal and provincial authorities. Potentially, they could have investigators from both jurisdictions wanting to see their books at the same time.

We encourage the federal regulatory authority to enter into discussions with the provinces to explore opportunities to reassure the public and to reduce any conflicting demands and duplicative administrative burdens on charities. All governments would need to consider the advantages and disadvantages of allowing a freer flow of information among the various authorities.

The Table's recommendations on this subject can be found in Chapter 3, under "Coordinated regulation."

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[11] See footnote 10 in Chapter 3 for an example of what can be achieved when provincial and federal authorities work together to handle deceptive fundraising.

Accountability and transparency in the proposed compliance regime

Accountability and transparency are a fundamental aspect of an effective compliance regime. However, the regulatory authority's first duty is to provide the individual charity in question with a full and prompt report of the findings from its monitoring activities.

In considering what to publish and when, it is necessary to balance the potential harm to an organization's reputation against broader considerations, such as:

- reassuring the public, both by demonstrating the regulatory authority is active and by placing the dimensions of the problem – whether large, small or non-existent – in the open;
- allowing the sector and the public to judge the regulator's use of its discretionary powers;
- providing a learning tool for both the sector and the public, by pointing out wider lessons in any reports;
- encouraging the community as a whole to serve as a watchdog; and
- creating an intermediate sanction, which we believe almost all charities would consider a powerful disincentive, but which is cost-effective, both in that it does not directly touch a charity's financial resources and in that it would cost relatively little to administer.

However, because of the power imbalance between the regulator and an individual charity, there is the danger that the regulator's definition of the situation may be given undue emphasis. For this reason, our proposals on transparency are shaped to limit public reporting that names the charity involved to situations where:

- the facts and law are self-evident;
- the organization is not contesting the regulator's interpretation of the facts and law; or
- a court has established the facts and law.

Table 4 on the following page uses the above criteria to summarize the proposed transparency regime.

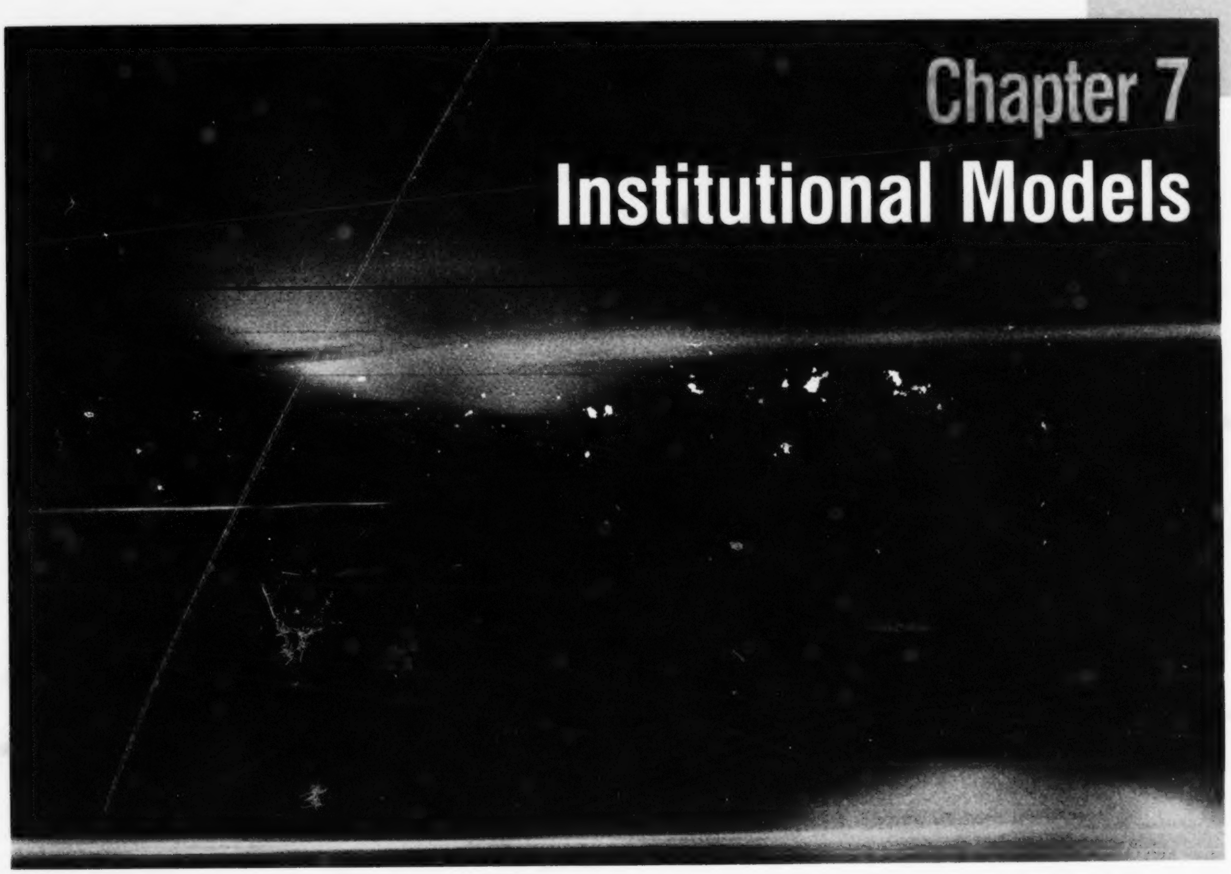
Table 4

Transparency in the Compliance Program

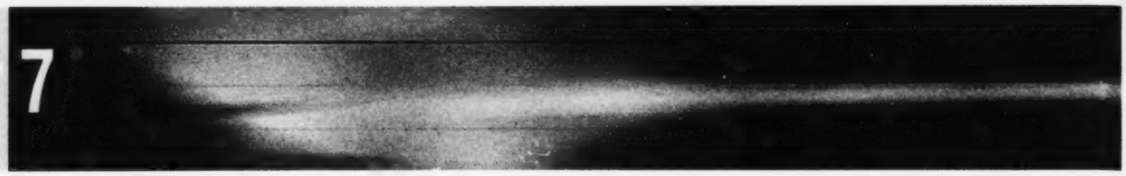
Method of Enforcement	**Degree of Transparency by Regulator**	**Comments**
Remedial agreements	Reporting without identifying the charity	Although the facts and law are agreed to as part of the settlement, this type of compliance action presupposes a good-faith effort by both parties to resolve a problem. While reassurance of the public, full regulatory transparency, and the community watchdog role are potentially important in these cases, on balance we believe these factors do not justify the potential harm to a charity's reputation that might result from naming it. The ministerial advisory group would maintain policy surveillance of this area. The regulator would publish a generalized account of these agreements in its annual report.
Publicity	**List names of charities on the website, with short explanation of the reason for listing the charity**	**The cases are likely to be numerous. The facts and law are self-evident. Publication is specifically designed to assist compliance.**
Suspensions of qualified donee or tax-exempt status	List names of charities on the website, with a short explanation of the reason for imposing the sanction	The facts and law are likely to be contested, but publication would only occur after recourse rights have been exhausted. These decisions need to be published in a readily accessible fashion, because the public and the sector have to know particularly if qualified donee status has been suspended. Publication in this instance also serves as an additional inducement to comply.
Deregistrations	**List names of deregistered organizations on the website, with a short explanation of the reason for deregistration. The letter setting out the reasons for deregistration would continue to be available on request.**	**Any publication would only be made after the charity has exhausted its recourse rights. The regulator should include in its annual report a summary of any court decisions involving proposed deregistrations.**
Annulments/ Terminations	List names of organizations on the website, with a short explanation of the reason for the annulment/termination	The facts and law would either be agreed to as between the regulatory authority and the organization, or determined in the recourse system.
Orders		**These would be public unless the court directs otherwise.**

Chapter 7

Institutional Models



Chapter 7



Institutional Models

The Joint Regulatory Table was instructed to elaborate on the implications of the three future scenarios of the charities regulator presented in *Working Together*, to consult on those models and to report its findings. The Table was not instructed to make a recommendation on a preferred model.

Introduction

In fact, we considered four models. Three of the models are essentially identical to the options recommended in *Working Together*. These are:

- Model 1 – CCRA, improved as a result of the Future Directions[1] initiative currently underway and through options we propose (regardless of who the regulator is) for a new appeals process, new compliance measures, and greater transparency of the regulatory process;
- Model 2 – an enhanced CCRA with an advisory agency[2] as recommended in 1999 by the Broadbent Panel on Accountability and Governance in the Voluntary Sector and similar to the "agency" described in *Working Together*; and
- Model 4 – a Charity Commission that would assume all regulatory functions currently performed by the CCRA.

We added a hybrid model to reflect the full range of options that exist.

- Model 3 – a combination of Model 1 and Model 4 that would leave administrative functions in the CCRA but create a Charity Commission to handle the adjudicative responsibilities involved in registering and deregistering charities.

We were not asked to express a preference for one model over another, but rather to provide more information about each of the models to enable a discussion about their respective merits to take place. To this end, we examined the functions and administrative structure of the various models and identified a set of criteria that could be used to assess them.

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[1] Near the start of the Voluntary Sector Initiative and the work of the Joint Regulatory Table, the Charities Directorate received separate funding to modernize some of its operations and determine how to provide better service.

[2] This is not the ministerial advisory group discussed in Chapter 3.

Certain aspects of the models are interchangeable – our task was essentially how best to arrange the various regulatory functions that must be in place and to evaluate the advantages and disadvantages of having various bodies assume some or all of those functions. For an overview of how we have assigned the regulatory functions under the different models, see Table 5.

The descriptions of the four models highlight how the various required functions have been arranged under each model and discuss some considerations linked to their implementation. The considerations identified are speculative. It is not possible to know with certainty how the models would work until implemented and none could be implemented quickly.

The functional descriptions of the models are followed by a list of evaluative criteria. The criteria are essentially those we identify in Chapter 3 as necessary conditions to the operation of any effective regulator of charities, including:

- clarity of its scope and mandate;
- its capacity to operate with integrity, professionalism, innovation and openness;
- its capacity to raise its public profile;
- its capacity to deliver education to the public and the sector;
- its chances of securing adequate resources;
- its capacity to work with charity law in an evolving society;
- its capacity to work together with provincial authorities;
- its capacity to extend its scope to the entire voluntary sector; and
- the challenge posed to make the model operational.

Table 6 summarizes our assessment of the models against the evaluative criteria.

We are aware that other models for enhancing the relationship between the Government of Canada and the voluntary sector are emerging under other aspects of the Voluntary Sector Initiative. The appointment of a minister with responsibility for the voluntary sector at the federal level was announced on October 8, 2002. New steering committees, at the government, sector and joint government/sector levels have been established. It will be necessary to determine the interplay between any model chosen and these new bodies.

In examining the models, we have considered some of the advantages and disadvantages of having some or all regulatory functions within an existing federal government agency or a standalone entity such as a commission.

There are some who argue that we should not examine any regulatory model that includes the CCRA. The assertion is that the CCRA, as a tax collector, has a conflict of mandates when it is also asked to consider an application that would exempt an organization from paying taxes and allow it to issue donation receipts to donors.

Table 5

Overview of Regulatory Functions

	Model 1 Enhanced CCRA	Model 2 Enhanced CCRA plus Voluntary Sector Agency	Model 3 Enhanced CCRA plus Charity Commission	Model 4 Charity Commission
Registration/ Sanctions (including deregistration)	CCRA (with advice from the sector)	CCRA (with advice from the Voluntary Sector Agency)	Commission (deregistration on application by CCRA)	Commission (with advice from the sector)
Compliance monitoring (T3010s)	**CCRA**	**CCRA**	**CCRA**	**Commission**
Audit	CCRA	CCRA	CCRA	Commission
Administrative policy	**CCRA (with advice from ministerial advisory group)**	**CCRA (with advice from Agency)**	**Commission (with advice from CCRA and ministerial advisory group)**	**Commission (with advice from CCRA and ministerial advisory group)**
Education and training on registration & compliance under the *Income Tax Act*	CCRA	Voluntary Sector Agency	Commission	Commission
Education and training on issues beyond registration and compliance under the *Income Tax Act* (such as board governance)	**Voluntary sector umbrella groups**	**Voluntary Sector Agency**	**Voluntary sector umbrella groups**	**Voluntary sector umbrella groups**
Public information	CCRA	CCRA or Agency for specific charities; Agency for sector	CCRA or Commission for specific charities; Commission for sector	Commission
Advisory committee	**Yes to the Minister of National Revenue**	**Voluntary Sector Agency performs this role**	**Yes to Commission**	**Yes to Commission**
Reports to:	Minister of National Revenue (MNR)	CCRA: MNR Agency: MNR *or* another Minister *or* Parliament	CCRA: MNR Commission: MNR *or* another Minister *or* Parliament	MNR *or* another Minister *or* Parliament

We have included an analysis of what has been termed the "enhanced CCRA" model, both because our mandate directed us to do so and also because we have not found evidence to support the assertion that such a conflict does, in fact, exist. The argument that the CCRA is an inappropriate regulator of charities asserts that when considering whether to register an organization as a charity, examiners consider the forgone revenue that might otherwise be payable to government. In practical terms, this argument can only be about the tax credits available to donors to charities, since the organization would be unlikely to pay taxes in any event. If it is not registered as a charity, it is likely to be a not-for-profit organization and therefore exempt from taxes.

While we do not believe there is a conflict in mandates in having the CCRA act as the regulator, there may be other inherent conflicts, which may have implications for the models. For example, placing regulatory functions within an existing government agency means the regulator has to meet a range of objectives – those linked to its purpose and mandate plus those of the agency in which it is located. A commission would have a singleness of purpose and limited management layers. However, if the regulator remains within a government department, it would be able to take advantage of infrastructure and services, such as legal advice, corporate services and information management systems, that are already in place.

Placing regulatory functions outside a government agency may create fewer administrative difficulties. It has been argued, for instance, that creating a standalone commission may improve staff retention rates. However, some individuals may feel there is greater opportunity for advancement within a larger government agency as compared with a small, specialized commission. Others argue that the profile and visibility of a standalone regulatory body may be greater than that of a small, operational unit within a larger government agency. The commission may also be able to provide more specialized services to its clients and be seen to be more distant from both government and the sector, and as a result be seen to be more objective and impartial in its decision-making.

These and other considerations are discussed more fully below.

Model 1: Enhanced CCRA

Model 1 is closest to the current arrangement. No regulatory functions would be removed from the CCRA. The CCRA would continue to be an administratively autonomous agency administering legislation that is under the policy direction of the Minister of Finance. In other words, the CCRA administers the provisions of the *Income Tax Act* that pertain to charities, whereas the Finance Minister is responsible for the *Income Tax Act* itself including any changes to the Act.

The Director General of the Charities Directorate would continue to report through the Assistant Commissioner, Policy and Legislation, to the Commissioner of the CCRA.

The role of the Charities Directorate would be to continue to reflect the intent of Parliament through its administration of the part of the *Income Tax Act* pertaining to charities. The Directorate would apply the law in a fair, consistent and open manner through greater transparency of its decision-making processes, the publication of its reasons for decisions and greater emphasis on building the skills of its employees to deal competently with the complexities of charity law.

Applicants would be able to seek a review by an impartial authority of a decision to deny registered status. For a description of the existing appeal process and proposals for reform, see Chapter 5. The proposed appeals process is the same across all models.

A **charities advisory group** would be established to provide administrative policy guidance on such issues as the administration of the sanctions regime, mechanisms for achieving compliance and developments in charity law. It would also identify issues for consultation and strengthen the CCRA's ability to identify emerging issues and trends. As this body is not strictly advising on technical matters, it would be advisory to the Minister of National Revenue.

The advisory group would consist of non-governmental charity law specialists and representatives of the voluntary sector. Some have suggested that the CCRA would benefit from involving officials from other government departments on the committee to provide technical advice. However, public servants have a conflict of interest between their duties to ministers and their responsibilities as members of an "independent" advisory group. Therefore, government officials could only participate in an advisory capacity.

Additional resources would be provided to enable the regulator to provide greater support to charities in understanding their legal obligations. Charities Directorate staff would visit locations across the country and meet informally with charities and umbrella groups to discuss concerns, issues or questions. Also, the Directorate would broaden its outreach program to provide greater access to its educational seminars.

Additional support and information would be available through a quarterly newsletter and an enhanced website. This would assist charities in understanding the rules that govern them federally and ensure organizations interested in seeking charitable status are aware of the application process and eligibility requirements. Voluntary sector umbrella groups would provide support and assistance to charities with concerns not related to the *Income Tax Act*.

The profile and visibility of the Charities Directorate would be enhanced through a greater presence on the CCRA's website, annual reporting to the public through its website on its program activities and achievements, and increased participation in sector and allied professional conferences and symposiums.

Service improvements would also be in place as a result of the CCRA's Future Directions Initiative. Performance indicators would be established with input from the ministerial advisory group on registration, policy and communications, compliance, returns and client assistance. There would be annual public reporting on the service expected and delivered.

The CCRA would also retain responsibility for providing information about charities and the charitable sector to the public. Through its Future Directions Initiative, the Directorate would develop and maintain an enhanced website with a searchable database that would provide greater public access to information about charities including current status, reasons for registration, annual information returns, and any compliance actions taken. A more thorough description of our proposals for enhancing the transparency of the regulator can be found in Chapter 4.

Considerations

Since this model is closest to the current administrative structure it is the least costly and least complex to implement. While legislative amendments would be needed to implement our recommendations on transparency, sanctions and the appeals process, no significant statutory provisions would need to be introduced to implement this model.

At the same time, the Charities Directorate is a very small operational unit within a large federal government agency, and there is a long history of its being neglected in terms of resources. The Charities Directorate would need additional resources to enhance its operations and profile as well as meet performance expectations.

The CCRA is recognized for its ability and expertise in interpreting and applying the *Income Tax Act*, including the administration of a number of social benefits such as the Canada Child Tax Benefit. Indeed, the CCRA administers some 62 statutes on behalf of a variety of government departments, ranging from immigration to agriculture. It collects fees and taxes, and it waives fees and taxes. However, the Directorate's policy development capacity and external consultation program would need to be enhanced.

What we heard

A number of commentators concurred with our observation that the CCRA is recognized for its ability and expertise in interpreting and applying the *Income Tax Act*. They also suggested that the CCRA would never abandon the field of ensuring compliance with the *Income Tax Act*. Others noted that the Charities Directorate, through its participation in the Voluntary Sector Initiative and the administrative changes being undertaken through the CCRA's Future Directions Initiative, has demonstrated a willingness and commitment to better meet the needs of charities. On the other hand, some concern was expressed that once the Voluntary Sector Initiative is concluded, there would be less public pressure to listen to and address the needs of charities.

An equal number of commentators also agreed with our observation that the Charities Directorate is a small operational unit within a large federal bureaucracy and that there is a history of it having been neglected in terms of resources. A few questioned whether the CCRA has the ability to assess public benefit, and felt that the CCRA's auditors seem more preoccupied with a charity's financial statements and accounting practices than with whether its activities continue to be charitable at law. An additional concern expressed about Model 1 was that it entailed no direct support to the sector beyond educating charities on registration and compliance issues.

Finally, one written submission argued that the costs (implicit or real) of the CCRA's inability to achieve its mandate as regulator had not been addressed or evaluated. The brief further argued that there is a social cost associated with the regulator not achieving desired levels of success, and that the cost must be accounted for when considering the cost savings realized under Model 1.

Our conclusions

The consultations confirmed for us that Model 1 has been well described and its implications fully assessed.

Overall, support for Model 1 tended to hinge on the assumption that:

- the core values identified by the Table would be adopted;
- the Table's recommendations for increased accessibility and transparency, an improved appeals process and intermediate sanctions would be accepted; and,
- there would be adequate resources for the Directorate to carry out its enhanced administrative and regulatory functions.

Opposition to Model 1 tended to come from those who felt that institutional reform should go beyond augmenting resources and capacity. The CCRA, they argued, is dominated by tax considerations, lacks the mandate to administer a broad social policy function, and does not possess a philosophical understanding of the voluntary sector.

Model 2: Enhanced CCRA + Voluntary Sector Agency

Under this model, two institutions would have complementary mandates. The CCRA would continue to administer the *Income Tax Act* and make the decisions. The Voluntary Sector Agency (VSA) would conduct outreach with the voluntary sector and the public and advise the CCRA on administrative policy. To fulfil such a mandate, the VSA would report to Parliament through a minister.

The VSA, as an arm's length body, would have a presiding board composed of part-time members supported by a professional staff. The latter might be public servants appointed under the *Public Service Employment Act*, but they could also be employed by the presiding board. The head of the staff could be appointed by either the Public Service Commission or by the Governor in Council[3] and the head would answer to the chair of the presiding board. The chair would have statutory authority for the management of the staff and the financial affairs of the VSA.

The length of term for which appointees would serve, reporting relationships, eligibility for re-appointment and conditions under which they could be removed would be set out in legislation.

The VSA would have the general function of promoting the effective use of charitable resources by encouraging the development of better methods of administration and by providing charity trustees and directors with information or advice on any matter affecting a charity. Some examples of areas where the VSA might provide advice include:

- matters outside federal regulatory jurisdiction;
- fundraising;
- governance practices; and
- other matters that may fall within provincial jurisdiction.

The VSA would assume the CCRA's compliance education function within its broader education role. It would essentially be a one-stop clearinghouse of information about the entire sector and on best practices in voluntary sector management and administration. This is the only model that includes the mandate to serve the broader voluntary sector and not just registered charities. The CCRA would be called upon to provide advice on developing and implementing the VSA's compliance education program for charities.

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[3] Appointments by the Governor in Council are those made by the Governor General on the advice of the Queen's Privy Council of Canada represented by Cabinet and are handled through a distinct process which recognizes the Prime Minister's prerogative to coordinate or determine all appointments. The Prime Minister is supported by the Director of Appointments within the Prime Minister's Office who, in consultation with Ministers' offices, is responsible for identifying high calibre candidates who could be considered for such an appointment. The Privy Council Office plays a supporting role to both the Prime Minister's Office and the Clerk of the Privy Council on Governor in Council appointments, and works cooperatively with the Director of Appointments in identifying vacancies and interviewing potential candidates. The Privy Council Office ensures that statutory and procedural requirements are met, and advises on issues of feasibility, remuneration and conditions of appointment.

The VSA would also act as a champion and promoter of the sector. It would be an interface between government and the sector and represent the concerns of the sector to government. The VSA could potentially pull together support and consultation functions carried out in other government departments, such as Canadian Heritage, Human Resources Development Canada, Health Canada and Industry Canada. The VSA would also assume part or all of the CCRA's current responsibility for providing public information about charities.

This is the only model without an advisory group because it is assumed that the VSA would perform the advisory function. The VSA would provide the CCRA with administrative policy advice and would have the authority to review policy decisions made by the CCRA and provide comment, in aggregate, on trends. It would not, however, have the authority to review specific cases.

The VSA and the CCRA would develop guidelines on information sharing and have the ability to confer and consult at various organizational levels.

Considerations

The VSA could foster the development of the voluntary sector in Canada by increasing the profile of the sector and creating a central point of contact for information about the sector. However, there may be considerable scope for conflict between the VSA and the CCRA. The VSA's recommendations would carry significant weight, although it would not be a decision-making body. At the same time, the ability to comment on cases, even in aggregate, without having authority or responsibility for their disposition may create some tension between the two institutions if the VSA disagrees strongly with a CCRA decision or its approach to charity files. On the other hand, this input may be useful in helping the CCRA identify issues of concern to the sector and explore possible solutions. Also, having an agency dedicated to voluntary sector issues may encourage greater discussion on the health of the voluntary sector in general and the status of charity law in Canada.

Some have suggested that the VSA act as an interface between government and the sector. This could further enhance the relationship between the sector and government. However, this model may duplicate efforts. While the VSA could potentially pull together support functions in other government departments making it easier to gather information, it may be more desirable to have individual departments with technical knowledge and expertise continue to provide support and information to parts of the sector they deal with most frequently. In addition, the sharing of best practices in voluntary management, as an example, may be more effectively and efficiently undertaken by existing sector umbrella groups.

At the same time, it should be noted that a number of potential roles described for the VSA, such as the policy co-ordination and champion roles, are not currently being performed, while others are under-resourced. The question of roles and resources is presently being discussed in terms of the future governance of the Voluntary Sector Initiative, and there is recognition that these new roles have resource implications regardless of the institutional model.

What we heard

Virtually all who commented supported our observation that a separate advisory agency should provide support to the sector, noting that charities would be uncomfortable being candid with the regulator. The point was made that the sector has a "spectacularly broad mandate" and that charities need assistance with issues beyond compliance with the *Income Tax Act*. There was also agreement with our assertion that the purpose of the VSA would not simply be to assist charities but also to provide administrative policy advice to the regulator and act as a champion for the sector.

While there was agreement that the support function needed to be undertaken, participants were split on whether a new body, such as the VSA, was needed or if existing umbrella groups, professional organizations or local community groups could carry out this function. There was concern that the interests and agendas of larger charities and national umbrella groups may dominate the VSA. However, we also heard that a sector advisory committee could help to ensure representation from smaller charities.

A number of participants felt that the VSA could interact more effectively with the provinces than other models by establishing itself as an accreditation body to which all charities and regulators would look for best practices. On the other hand, the VSA was seen as a barrier to more open communication between the regulator and those regulated. There was a concern that with the creation of a VSA, the CCRA would lose touch with the voluntary sector, and that charities and the CCRA would have to communicate through the VSA. A concern was also expressed that there might be conflict between the two organizations.

Our conclusions

The consultations confirmed for us that Model 2 has been well described and its implications fully assessed.

Overall, support for Model 2 tended to come from those who felt a separate body was needed to provide a centralized source of support to charities and the broader voluntary sector on governance and accountability. Opposition tended to come from those who felt that existing sector umbrella groups and professional organizations could take on this function.

Model 3: Enhanced CCRA + Charity Commission

As with Model 2, Model 3 would divide responsibility for the regulation of charities. The Charity Commission would assume most responsibilities associated with administering the *Income Tax Act* as it relates to charities. The CCRA would provide compliance monitoring and auditing functions.

The role of the commission in this model is somewhat narrower than the commission model outlined in the 1999 Report of the Joint Tables. In *Working Together*, the role of the commission was described as follows:

> A quasi-judicial commission would undertake most of the functions currently carried out by the Charities Directorate. It would provide authoritative advice to the voluntary sector, and expert adjudication of appeals on decisions by its Registrar. At the same time, such a commission would have a support function not unlike Model B's agency.[4]

The commission described here and in Model 4 would have a narrower role. It would not have a support function beyond compliance. An impartial authority outside the commission would perform expert adjudication of appeals. The commission would simply assume the current regulatory powers of the CCRA to administer the law. At the same time, one of the overall purposes of the commission would be to re-examine the issue of registration.

The commission would not be able to create legal precedent or recognize new charitable purposes where an analogy to a previously recognized charitable purpose cannot be found or developed. However, as in Model 1, an applicant would be able to seek a review by an impartial authority if its registration were denied. The Minister of National Revenue could also initiate reconsideration of a charity's registration by applying to the commission but the commission would make the final determination. The Minister of National Revenue would have the right to launch an appeal if the Minister disagreed with a decision of the commission.

As in Model 1, an advisory group would provide policy advice but in this case to the commission. This is an unusual feature of the model since generally multi-member boards and commissions see themselves as capable of seeing the viewpoints of the sectors involved. It has been retained to ensure the commission has a sense of the full diversity of the charitable sector.

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[4] Model B referred to in *Working Together* is equivalent to our Model 2.

As in Model 2, the commission would be supported by a professional staff. They could be public servants appointed under the *Public Service Employment Act*, but they could also be employed by the commission. The head of the staff could be appointed by either the Public Service Commission or by the Governor in Council and would answer to the commission chair.

The chair would have statutory authority for the management of the staff and the financial affairs of the agency as a whole. The length of term for which appointees would serve, reporting relationships, eligibility for re-appointment and conditions under which they could be removed would be set out in legislation.

Members of the commission's board could be drawn from the institutional community (charity law specialists, senior voluntary sector officials) and have some level of expertise from a legal, sectoral or government perspective. Specific requirements for the composition of the commission could be laid out in statute.[5] The staff complement would be of comparable size to the Charities Directorate.

Considerations

It is difficult to predict whether the residual role of the CCRA for compliance monitoring and audit would pose undue complications. There are concerns that if the CCRA is pursuing its own statutory-based program responsibilities this may result in conflict between the two organizations. There is, however, an example in the *Income Tax Act* where responsibility for administering tax law for a particular domain has been divided between two institutions. The Canadian Cultural Property Export Review Board (CCPERB) may provide a partial model for retaining a role for CCRA in administering charities' compliance with all aspects of the tax law.

To encourage philanthropy, the *Income Tax Act* and the *Cultural Property Export and Import Act* provide tax incentives to persons who wish to donate significant cultural property to Canadian custodial institutions[6], which have been designated[7] to receive or purchase such property. The CCPERB is an independent tribunal within Canadian Heritage, which certifies cultural property for income tax purposes[8]. In addition to certifying whether or not such property meets certain criteria, the Board may also determine the fair market value of the property. Like the CCPERB, under this model the commission would make determinations for the purposes of the *Income Tax Act* and provide advice to government on matters under its jurisdiction.

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[5] For example, the Canadian Human Rights Commission has up to eight appointed members. The Chief Commissioner and Deputy Chief Commissioner are appointed for seven years. The other Commissioners have their own professions and contribute to the work of the Commission on a part-time basis. The Commissioners come from different parts of Canada and a variety of backgrounds. There is a balance of men and women. Commissioners meet regularly throughout the year to review cases and discuss the work of the Commission. Another example is the Canadian Cultural Property Export Review Board whose nine members are also appointed by government. Four are drawn from museums and galleries while the remaining members represent the private sector, collectors, appraisers and dealers.

[6] Generally, Canadian museums, art galleries, archives and libraries.

[7] Institutions and public authorities, which meet the legal, curatorial and environmental requirements for designation, and have been so designated by the Minister of Canadian Heritage.

[8] The CCPERB reviews 1500 applications for certification per year.

Some have suggested that the commission should report directly to Parliament and not to a cabinet minister. Delegating regulatory powers to a new body with direct access to Parliament may increase its visibility and profile through more public reporting to Parliament. It may also increase its independence from political interference. However, there are very few examples of arm's length regulatory bodies reporting directly to Parliament, except on issues of national importance such as access to information and privacy. This would be very difficult to achieve in the short term.

What we heard

A number of those who commented asked for clarification concerning the possible relationship between the CCRA and the Charity Commission. Would the CCRA's Rulings Directorate accept compliance advice given to a charity by the commission? How would a charity that spent little on charitable purposes be dealt with if the CCRA has the power to conduct audits but only the commission has the power to deregister? Would the division of regulatory functions make it difficult for the Minister of National Revenue to carry out the responsibilities assigned under the new *Charities Registration (Security Information) Act?*

Of those who commented in support of the division of regulatory functions, the majority felt this model would address the perceived conflict of interest in having the tax authority act as the regulator. In addition, they felt the commission would attract more attention and resources than the Charities Directorate does within the CCRA. On the other hand, there were an equal number of comments from those who believed it would lead to conflict and jurisdictional debates between the two agencies, add unnecessary expense, and create greater confusion for charities and the public as to how charities are actually regulated.

Our conclusions

We were asked if the CCRA's Rulings Directorate would accept compliance advice given to a charity by the commission. It is our view that the commission and the CCRA would work closely together in providing opinions on fact specific cases in much the same way that the Rulings Directorate and the Charities Directorate do now. In terms of outlining what body would have responsibility for providing what advice, it would depend on the issue. On tax specific issues, it would be the CCRA, while on charitability issues it would be the commission.

We were also asked to clarify how charities that spend little on charitable purposes would be dealt with if the CCRA has the power to conduct audits but only the commission would have the power to deregister a charity. In this instance, we believe the CCRA would conduct an audit based on instructions provided by the commission. It is our feeling that this is consistent with the existing situation where the regulator selects charities for audit and instructs the field auditor on what to examine. The auditor would provide the results of its examination to the commission, which would determine what compliance action is warranted.

Commentators suggested that Model 3 would be incompatible with the responsibilities assigned to the Minister of National Revenue under the new *Charities Registration (Security Information) Act*. The Act gives the Minister the power to jointly sign a certificate with the Solicitor General, and if the certificate is upheld as reasonable by a judge of the Federal Court, it disqualifies an organization from registration. These commentators suggested that dividing the registration and compliance functions would pose real difficulties in terms of the role CCRA assumes under this legislation to try to identify applicants that have connections to terrorist groups. We believe this issue could be addressed since the commission would be a part of government. However, a problem would exist if the regulatory body were to sit outside of government.

With these clarifications, we believe Model 3 has been well described and its implications fully considered.

Model 4: Charity Commission

The commission described here, as in Model 3, would have a narrower role than the one described in *Working Together*. It would not have a support function beyond compliance. An impartial authority outside the commission would perform expert adjudication of appeals. The only difference between this commission and the one described in Model 3 is that it would assume the powers of the CCRA to administer the law. This model differs from Model 1 only in terms of its governance structure, visibility and cost. There would be no direct residual role performed by the CCRA.

However, cooperative information linkages would have to exist, since many aspects of compliance work, such as the checking of tax receipts, would be severely compromised if there were no communication between the Charity Commission and the CCRA. Care would need to be exercised to ensure that such routine exchanges would not affect the independence of the commission.

Considerations

The stand-alone commission model resolves the problems of divided responsibility. Otherwise, the characteristics and comments about the commission in the preceding model apply.

Regulatory bodies, no matter how much at arm's length from government, are obligated to apply the law as passed by Parliament and elaborated through regulation (where authorized). There is no formal barrier to a minister – or a commission – exercising a more interpretive, flexible regulatory authority provided Parliament grants the necessary authority. If this authority was considered appropriate, because of the need for transparency and objectivity, it may be preferable for it to be assigned to an arm's length body such as the Charity Commission described here and in Model 3.

What we heard

Those who commented in favour of Model 4 argued that charities could never identify with a regulator housed in a government department or agency. The supporters of this model felt a commission would bring unity to a disparate sector, and this would have practical benefit for charities. They also felt a commission had greater potential for a higher profile than a body placed inside a larger government agency.

Those who opposed the creation of a commission argued it would require a significant investment without a clear indication that it would be any more competent or effective than the current model. Of these, a number commented that the need for a commission could only be justified if jurisdiction for the regulation of charities was not split between different levels of government and/or if it were given responsibility for the various pieces of federal legislation that govern the charitable sector beyond the *Income Tax Act*, including the *Canada Corporations Act* and the *Competition Act*.

As in Model 3, some commentators expressed concern that the commission would be dominated and driven by the needs of larger charities and that it would not be possible to constitute its board as a representative body. In addition, some asked for clarification on the commission's ability to assume the CCRA's investigative powers, including making workplace searches.

Our conclusions

Commentators expressed concern that the interests of larger charities may dominate the commission and that its governing board would not be representative. We wish to clarify that the role of the regulator under any of the models is to interpret and apply the law. The commission's staff would be comprised of public servants and its presiding board would be made up of Governor in Council appointees.

As such it would be an expert body rather than a representative body. Input and advice from the sector would largely be provided through the ministerial advisory group as in Model 1, although it is reasonable to assume that some of the appointments to the board and management may be individuals with experience in the sector. In addition, we anticipate that the ministerial advisory group would bring a wide range of perspectives to the table, including the viewpoint of small charities.

Commentators also asked for clarification on the commission's ability to assume the CCRA's audit powers, including making workplace searches. Enabling legislation would be needed to allow the commission to assume this power.

With these clarifications, we believe Model 4 has been well described and its implications fully considered.

Assessment of the institutional models

In Chapter 3, we identified a number of core values and critical success factors in our evaluation of the characteristics of an ideal regulator. These have been further developed as a result of our consultations. The core values and critical success factors identified in Chapter 3 are summarized below to serve as evaluative criteria when considering the implications of various models, their costs and benefits, and the degree to which the models meet the needs of various stakeholders. The following evaluative criteria do not appear in any particular order of importance.

Evaluative criteria

Focus of mandate

This criterion speaks to the purpose of a regulator under each model. Comments we received during our consultations have reinforced our view that the mandate of the regulator should continue to be the administration of the charity provisions of the *Income Tax Act* but some additional functions are suggested under Model 2 that may broaden its mandate.

Integrity

As we heard in our consultations, integrity means the regulator will treat people fairly and apply the law fairly.

Openness

The comments received in our consultations reinforced the need for the regulator to communicate openly about its decisions and performance to ensure decisions are fair and regulation effective.

The regulator should be open and approachable. It should be responsive to the needs of diverse cultures and regions.

Service excellence

As confirmed in our consultations, this criterion speaks to the capacity of the regulator to be committed to delivering consistent and timely decisions and information to its clients.

Knowledge and innovation

The regulator should continually improve its services by seeking to learn from both what it does and what it does not do well. This means building partnerships and working with the sector and others toward common goals.

Support

The regulator should have responsibility for making sure charities understand the legislative and common law rules that apply to them and have the assistance they need to comply with those rules.

Based on our consultations, we have broadened this criterion to also include:

- education of the sector about the requirements and process for registration;
- education of the public about what charities do and about giving wisely; and
- education of regulatory staff to encourage consistent application of the law, professional development and staff retention.

Public profile/visibility

Public trust and confidence is decreased when there is limited knowledge that regulation exists. Therefore, it will be important for the regulatory body to ensure that it has a public profile. Such a profile does not come only – or even primarily – from regulatory actions. There must be a determined effort by the regulator to establish an "institutional" identity. Canadians must be aware that the regulator exists, what it does, and what registration as a charity does and does not mean.

Resources

This financial criterion addresses two considerations: the direct expense required to establish the new institutional elements and the additional costs to operate that system in comparison to the current arrangement.

Legal principles and powers to determine charitable status

An effective regulator is one that is both enforcing the law and interpreting the law in light of changing social conditions through the use of analogy. This criterion speaks to the ability of the regulator to participate in the evolution of the law by eliminating outdated purposes, developing analogies and creating administrative precedents in consultation with the sector.

Coordinated regulation

A significant part of the authority to regulate charitable activity is vested in the provinces and territories. Our consultations reinforced our view that there is benefit to formally exploring opportunities to develop a better coordinated system of regulation.

This factor speaks to the ease and ability of the institutional arrangement to accommodate or work with provincial and territorial authorities to foster a consistent and coherent set of rules for charitable regulation across jurisdictions.

Broader voluntary sector

The Voluntary Sector Initiative was designed to look at more than just registered charities. It was designed to strengthen voluntary sector organizations. While at the federal level supervision is focused more narrowly on charities and we have therefore focused our attention on issues connected with registered charities, we recognize there is an important support role that may be needed to strengthen the voluntary sector. This criterion highlights support that would be available to the entire sector beyond the assistance provided by the regulator to help charities comply with the *Income Tax Act*.

Transition challenge

There is an element of complexity involved with managing the change implied under each model. This criterion addresses the challenges of improving service levels, transferring regulatory functions and creating new institutions across the range of possible models.

Introduction to the analysis matrix

Table 6 takes the various models and tests them against the evaluative criteria we have identified. The models are not mutually exclusive. It is possible to take some aspects from various models and piece them together to create a regulatory body that is not specifically outlined in this report.

In some cases our assessment of a model is necessarily speculative. For example, in the case of the Charity Commission (Model 4), much will depend on who the Commissioners are and the rules that they formulate. Similarly, it is not possible to predict how the Charities Directorate's Future Directions Initiative will affect its ongoing operation.

Table 6

Assessment of Models

	Model 1 Enhanced CCRA	Model 2 Enhanced CCRA plus Voluntary Sector Agency	Model 3 Enhanced CCRA plus Charity Commission	Model 4 Charity Commission
Focus of mandate	Focus is on administering the law	Different mandates for different institutions: CCRA focused on administering the law; VSA focused on support, information provision and nurturing the sector	Focus is on administering the law with responsibilities shared between two institutions	Focus is on administering the law
Integrity	Regulator would apply and interpret the law acting on the same basis as the courts. Decisions would be subject to review by an impartial authority	Same as Model 1	Same as Model 1	Same as Model 1
Openness	Possible through advisory body, public consultation, annual reporting, and a website where annual returns, the decisions and policies of the regulator, impending legislative amendments, and a searchable database of court decisions are displayed	Perhaps greatest potential in that organizational focus of VSA is advice and communication	Same as Model 1	Same as Model 1

Table 6 (Continued)

Assessment of Models

	Model 1 Enhanced CCRA	Model 2 Enhanced CCRA plus Voluntary Sector Agency	Model 3 Enhanced CCRA plus Charity Commission	Model 4 Charity Commission
Service excellence	Possible, performance indicators would need to be established	Same as Model 1 – in addition, the VSA could provide a watchdog role	Same as Model 1	Same as Model 1
Knowledge and innovation	Possible through greater connection to other government departments and the sector through the advisory body, roadshows, consultations, attendance at annual sector conferences, staff development opportunities, etc.	Gathering and sharing information would be key role of new VSA	Perhaps greater opportunity (as a new body) than in Model 1 to be innovative and tailor its organizational culture to its organizational mandate	Same as Model 3
Support	Possible through enhanced publications, site visits, call centre and website. Support would include education of the sector about the requirements and process for registration, education of the public about the charitable sector and giving wisely, and education of regulatory staff	Perhaps greatest under this model. In addition to registration and compliance education provided by the CCRA as in Model 1, VSA would provide the sector with education on board governance and accountability and the rules affecting voluntary sector organizations in other jurisdictions and could potentially coordinate support functions in other government departments	Same as Model 1	Same as Model 1

Table 6 (Continued)

Assessment of Models

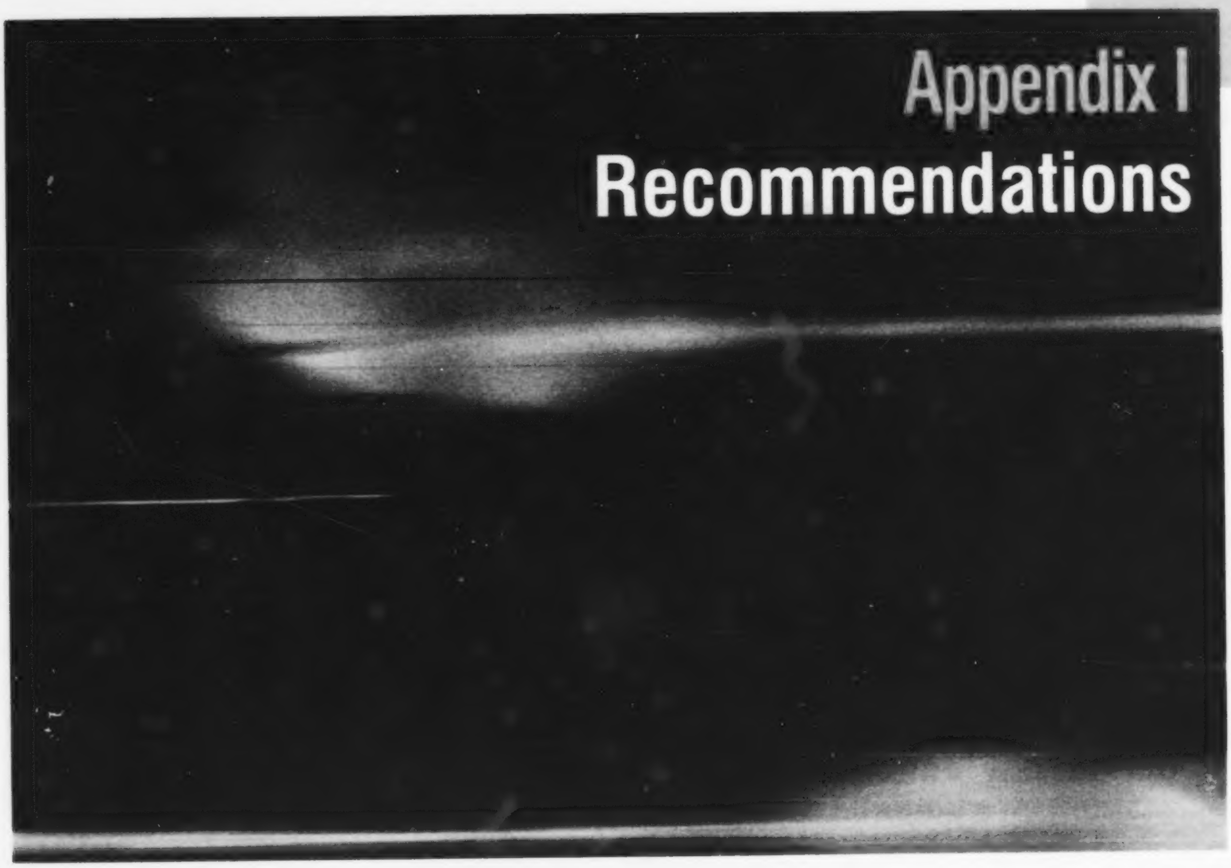
	Model 1 Enhanced CCRA	Model 2 Enhanced CCRA plus Voluntary Sector Agency	Model 3 Enhanced CCRA plus Charity Commission	Model 4 Charity Commission
Public profile/visibility	Possible through website, annual report, increased communications capacity and CCRA's name on income tax receipts	Greater than in Model 1 due to presence of new Agency and requirement to report to Parliament through a Minister	Similar to Model 2	Similar to Model 2
Resources	Additional resources to carry out the recommendations in this report	Higher operational costs than in Model 1 because of new support function and emphasis on broader voluntary sector and not only charities. New infrastructure would be needed for a separate Agency	Greater than Model 1. Operational costs expected to be slightly higher than in Model 1. Also, there would be a one-time cost associated with creating a new Commission	Same as Model 3
Legal principles and powers to determine charitable status	Possible – capacity to enforce and interpret the law enhanced through development of clear guidelines on the extent of the regulator's authority to identify new charitable purposes, training for examiners and improved research capabilities	Same as Model 1	Same as Model 1	Same as Model 1

Table 6 (Continued)

Assessment of Models

	Model 1 Enhanced CCRA	Model 2 Enhanced CCRA plus Voluntary Sector Agency	Model 3 Enhanced CCRA plus Charity Commission	Model 4 Charity Commission
Coordinated regulation	Possible – by entering into discussions with other regulators, greater sharing of information between jurisdictions and a regulator's forum. CCRA has already demonstrated a capacity to coordinate in area of tax collection with some provinces and territories	Possible	Possible	Possible
Support of broader voluntary sector (non-profits that are not charities)	**Not included**	**Included as support and education function provided by VSA**	**Same as Model 1**	**Same as Model 1**
Transition challenge	Minimal	Moderate – Not much change on the regulatory side. New support function developed and placed inside new Agency	Complex – Most regulatory functions (with the exception of compliance monitoring) transferred to new body	Complex – All regulatory functions transferred to new body requiring the development of new practices and procedures

Appendix I
Recommendations



Appendix 1

Recommendations

The regulatory framework

Scope and mandate of the federal regulator

1. The primary role of the regulator should continue to be to administer the charity provisions of the *Income Tax Act*.

2. To enhance public trust and confidence in both the regulator and in charities, four fundamental principles should guide federal regulatory reform:

   2.1 the regulatory framework that governs charities should facilitate public trust in the work of charities in Canada;

   2.2 the regulatory framework should uphold the integrity of the provisions in the *Income Tax Act* that govern charities;

   2.3 the regulatory framework should ensure fair application of the law and transparency in regulatory decision-making processes; and

   2.4 the regulatory process should be as simple, non-duplicative and cost-effective as possible.

Guiding values

3. As a foundation for meeting the challenges of the future, the regulator should have four enduring values to guide it:

   3.1 **Integrity.** The regulator should treat people fairly and apply the law fairly.

   3.2 **Openness.** The regulator should communicate openly about its decisions and performance.

   3.3 **Service Excellence.** The regulator should be committed to delivering consistent and timely decisions and information to its clients.

   3.4 **Knowledge and Innovation.** The regulator should have the means to continually improve its services by seeking to learn from both the things it does and does not do well. This means building partnerships and working with the sector and others toward common goals.

Educating the sector

4. The regulator should inform and assist its clients.

5. The regulator should find new, innovative ways of delivering education to charities by building partnerships with the sector.

6. The regulator should have responsibility for educating sector organizations specifically about:

    6.1 the *Income Tax Act* and common law rules affecting them;

    6.2 the criteria and process for attaining and maintaining federally registered charitable status; and

    6.3 how to complete their annual returns.

7. The regulator should not assume responsibility for educating charities about:

    7.1 board governance and accountability issues (but the government and sector should explore other ways to enhance the professional capacity of individual charities and the sector as a whole to maintain public trust and confidence in the sector); or

    7.2 the rules affecting charities in other jurisdictions (but should refer clients to other sources for information on other federal laws affecting charities as well as provincial and municipal requirements).

Educating the public

8. The accounting profession, the sector and the regulator should work together to develop improved reporting standards of relevance to donors and charities.

9. The regulator should have responsibility to educate the public specifically about:

    9.1 charities, by releasing aggregate information on registered charities;

    9.2 issues to be aware of when giving to charity;

    9.3 the regulatory process including the review process used to determine charitable status;

    9.4 how to confirm the status of individual charities;

    9.5 how to file a complaint about a charity; and

    9.6 how to understand financial statements of charities.

Profile/visibility of the regulator

10. The regulator should make a determined effort to increase its national presence so the public is aware of what it does and whom to contact for information.

11. The regulator's name and contact information should be required on the official donation receipts that charities issue to donors.

Resources

12. The regulator should be appropriately resourced for the tasks which it must undertake, and specifically:

    12.1 a compensation study should be undertaken to ensure that classifications and levels of pay reflect the requirements of the job;

    12.2 senior management within the regulator should examine methods to encourage public servants to remain within the regulatory body and develop additional levels of expertise;

    12.3 resources should be made available for additional travel by the regulator's staff to events, including information sessions, conferences and seminars;

    12.4 senior management within the regulator should introduce professional-development opportunities such as secondments and exchanges with charities;

    12.5 the staff complement should be examined in light of the increased workload that will result from the Table's recommendations; and

    12.6 priority should be placed on development of information-technology systems that will meet the current and future needs of the regulator.

Legal principles and powers to determine charitable status

13. Clear policy guidelines should be developed on the nature and extent of the regulator's authority to identify new charitable purposes that flow from the application of the common law to organizations under the *Income Tax Act.*

14. The regulator should enhance the training examiners receive upon entry and on a continual basis.

15. The regulator should introduce better research tools for decision makers, such as electronic access to a searchable database on previous decisions of both the regulator and the courts, to allow examiners to better identify similar fact situations and more consistently interpret the law.

Coordinated regulation

16. The regulator should enter into discussions with the provinces to explore opportunities to reassure the public that charities are being effectively regulated and to reduce any conflicting demands and duplicative administrative burdens on charities.

17. Legislative amendments should be made to allow the regulator to share information with the relevant provincial authorities and with other federal regulatory agencies.

18. Provincial governments should be encouraged to make appropriate changes to their legislation to provide better coordination of compliance programs.

19. A forum should be established to allow regulators to come together to discuss issues of mutual interest and concern.

20. The appropriate federal minister should play a lead role in convening the first gathering of charity regulators.

The broader voluntary sector

21. The government and the sector should undertake a thorough review of regulatory issues affecting the broader voluntary sector.

Public consultation

22. The regulator should develop ways to engage the sector in regular dialogue to hear concerns and issues identified by voluntary sector organizations.

23. The regulator should draw on the full range of methods to engage in a dialogue with the voluntary sector at the various stages of the policy development process.

24. The regulator should continue to consult on its draft policies.

25. The regulator should use its website to provide information about current consultations on draft policies, recently closed consultations, the results of previously held consultations, and consultations scheduled to begin.

26. The regulator should conduct its consultations in accordance with the Voluntary Sector Initiative's Code of Good Practice on Policy Dialogue.

Annual reporting

27. The regulator should be required to publish an annual report to the public on its performance and activities, and the report should include aggregate information about registered charities.

Ministerial advisory group

28. A ministerial advisory group should be established to provide administrative policy advice to the minister responsible for the regulator; and

    28.1 the advisory group should consist of appointees with a broad range of experience and knowledge;

    28.2 funding support should be provided to reimburse appointees for the direct costs associated with their participation on the advisory group; and

    28.3 sufficient funding should be provided to allow the group to carry out the tasks assigned to it.

Accessibility and transparency

Documents related to an application

29. The identity of applicant organizations should remain confidential until the regulator either accepts or denies the application.

30. The regulator should publish on its website reasons for all its decisions on applications.

31. The same documents that the *Income Tax Act* allows to be disclosed for registered charities should also be available on request for organizations that have been denied registered status, plus the letter setting out the reasons for the denial.

32. Organizations should be made aware early in the registration process that they can withdraw their application after receiving an Administrative Fairness Letter, and that, if they choose this option, then no information about their application will be released.

33. The regulator should establish a policy of denying applications where applicants do not respond within 90 days to communications from the regulator.

Documents related to a compliance action

34. No organization-specific information about compliance audits should be released, including acknowledging whether an organization is or is not under audit, unless in connection with the imposition of a sanction.

35. The regulator should provide more education to the sector and the public about the audit function.

36. The regulator should provide an account in its annual report of its compliance audits, including the number conducted and the length of time taken to complete audits.

37. The question of transparency in the audit function should be reviewed in two years, by the ministerial advisory group.

38. The regulator should finalize audits more promptly.

Documents on a charity's file that do not relate to either the application for registration or a compliance action of the regulator

39. If requested, the regulator should provide a copy of information a charity is required by law or policy to file in seeking special status or exemptions allowed under the *Income Tax Act*, as well as any response from the regulator.

40. If requested, the regulator should provide a copy of the financial statements that charities are required to file with their annual information return.

41. The policy granting certain religious charities an exemption from public reporting of financial information should remain as currently formulated.

Information not dealing with any specific organization

42. The regulator should publish on its website (and make print copies available on request), subject to the provisions of the *Access to Information Act* and the *Privacy Act*:

42.1 its policies and procedures;

42.2 its research database (including copies of relevant court decisions, its own previous decisions on novel or unusual applications, relevant information from other charity regulators, and technical interpretation letters, as well as relevant letters issued by the CCRA's Rulings Directorate);

42.3 draft policies ready for consultation;

42.4 impending legislative changes; and

42.5 operational guidance for charities.

Appeals

Internal reconsideration

43. An independent unit should be established within the regulator to provide internal reconsideration both of applications for registration that have been denied and of sanctions the regulator proposes to impose.

44. Organizations should be obliged to seek internal reconsideration before proceeding to court, unless the regulator and the organization agree otherwise.

45. Organizations should have 60 days to decide whether to seek a review of their case, and the review unit should have 60 days to complete the review, unless both the review officer and the organization agree to extend the time-frame.

46. The review unit should be staffed by officers experienced in charity law and in dealing with sector organizations.

47. The review unit should be centrally located, but adequately resourced to permit officers to travel.

48. The review unit should be bound by the regulator's existing policies.

49. The review unit should provide the organization seeking review with written reasons for its decision.

50. The decisions of the review unit should be reported in accordance with the applicable transparency recommendations of Chapter 4, and the regulator's annual report should provide a statistical profile of the unit's work.

Hearing *de novo*

51. Careful consideration should be given to making the Tax Court of Canada the site of appeals from decisions of the regulator, and such appeals should be held by way of hearing *de novo*.

Appeal on the record

52. An appeal on the record from the Tax Court should lie to the Federal Court of Appeal.

Judicial review of administrative decision making

53. The Federal Court Trial Division should continue to provide judicial review of administrative decisions.

Interveners

54. Existing court rules should apply in determining whether to allow interveners in a case.

Costs

55. Existing Tax Court rules on awarding costs should apply to charity cases heard before it but, in subsequent appeals, provision should be made that:

    55.1 regardless of the outcome of the appeal, the regulator would bear the costs of both parties, if it initiates the appeal from the lower-court decision;

    55.2 the regulator would bear the costs of both parties, if the organization initiates the appeal from the lower-court decision, and the appeal court overturns the lower-court decision in the organization's favour; and

    55.3 in all other cases, the regulator would bear its own costs, except that, if it considers an appeal frivolous or designed to delay, the regulator could ask the court to award it costs.

Appeal fund

56. An appeal fund to develop and present charity cases under the *Income Tax Act* should be established; and

    56.1 the fund should be administered by a body like the Court Challenges Program;

    56.2 cases should be selected for financial support on the basis of their potential to clarify charity law, for the benefit of the public at large, the sector and the regulatory authority;

    56.3 additional funding should be provided for the appeal fund, of sufficient size to obtain cumulatively the desired effect of clarifying charity law; and

    56.4 financial support should also be available for interveners.

Intermediate sanctions

Giving charities the means to comply

57. The regulator should undertake a program of continuing education designed to provide charities and their volunteers with the knowledge they need to comply with their legal requirements.

58. The regulator should review its website from the perspective of someone new to the field and design educational modules that convey essential information in language that is easy to understand.

59. The regulator should establish and publicize a policy that its role includes helping charities comply with their legal requirements and that it encourages voluntary compliance through working with charities to resolve problems that are disclosed to it.

Remedial agreements

60. The regulator should develop policies supporting the practice of seeking remedial agreements with non-compliant charities, but such agreements should not include a financial settlement.

61. The ministerial advisory group should monitor the fairness of the policies surrounding remedial agreements.

Handling charities that do not file their annual return

62. The regulator should publish on its website a list of charities that are under imminent threat of sanctions because they have not filed their annual return.

63. A fee of $500 should be charged to charities applying for re-registration after having been deregistered for failure to file their annual return, with the regulator having the power to waive the fee, in whole or in part, where appropriate.

Intermediate sanctions: penalties and inducing compliance

64. Assuming an adequate recourse system in the form we have recommended is in place, suspension of qualified donee status should be introduced as an intermediate sanction, with a requirement that a charity so suspended be obliged to notify donors and other charities of its status prior to accepting any gift from them.

65. The regulator should conduct research into the feasibility of a system to control the issuing of official donation receipts and report its findings to the ministerial advisory group within two years.

66. Assuming an adequate recourse system in the form we have recommended is in place, suspension of tax-exempt status should be introduced as an intermediate sanction, with the tax being set at up to 5% of the charity's previous year's revenue from all sources, or up to 10% of this amount for repeated cases of non-compliance, plus up to 100% of the revenue obtained from activities in breach of the requirements of the *Income Tax Act*.

67. Any monies raised from suspending tax-exempt status (amounting to more than $1,000) should be re-applied to charitable purposes, by being transferred from the regulator to another charity, as agreed upon by the regulator and the charity under suspension and in accordance with that charity's dissolution clause, or otherwise upon the direction of the court.

68. Financial penalties on individuals should not be introduced as an intermediate sanction at this time.

Deregistration

69. Deregistration should remain the ultimate sanction available to the regulator, but the revocation tax should be reformed in accordance with the principles set out in the Ontario Law Reform Commission's *Report on the Law of Charities*.

70. An additional ground for deregistration should be introduced: cases where the registration was obtained on the basis of false or misleading information supplied by the applicant.

Special case: annulments of registration

71. The legislation should specify the following grounds for annulment:
(a) where the registration was approved as a result of administrative error; and
(b) where the registration was obtained as a result of error on the part of the applicant.

72. The legislation should specify the grounds for terminating a registration, including the loss of charitable status as a result of changes to law or policy.

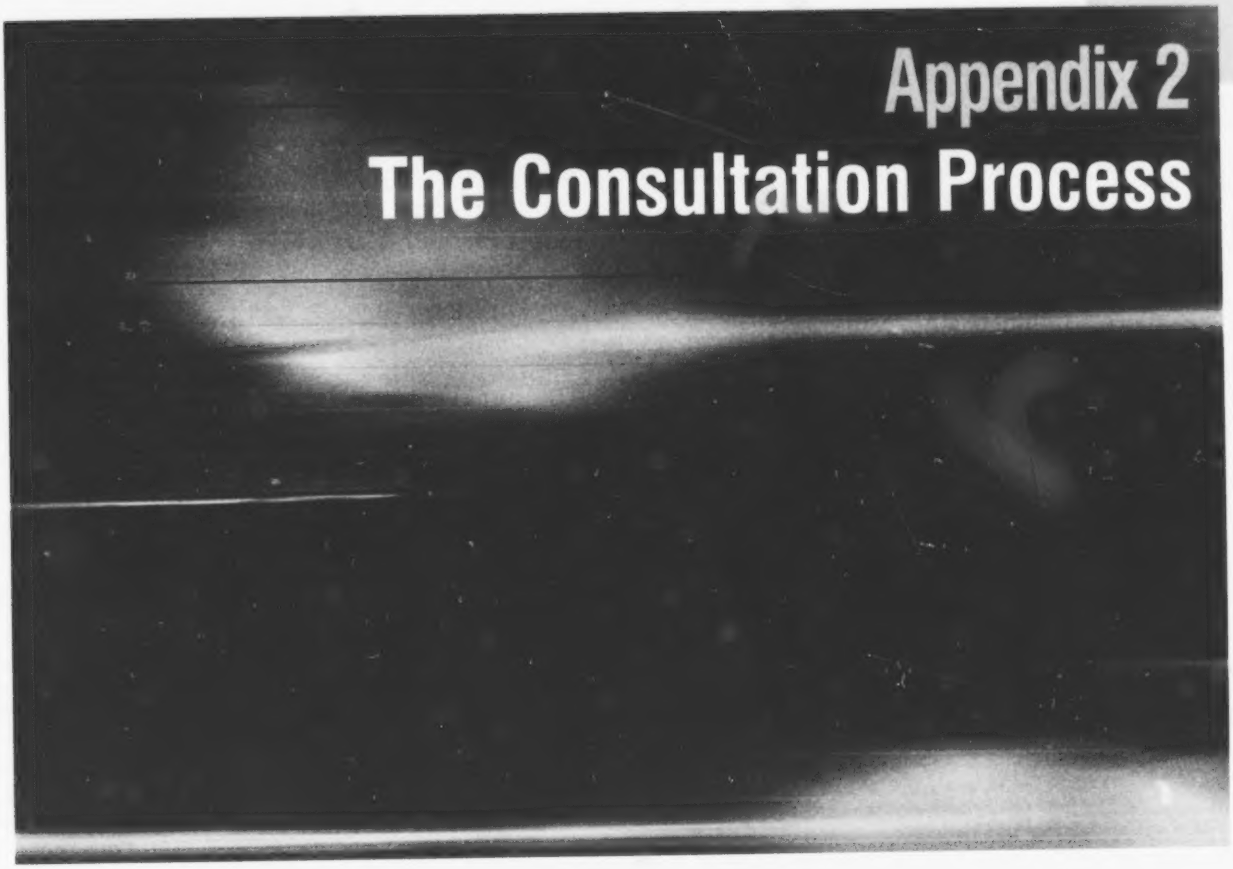
73. An organization under deregistration proceedings should be allowed to appeal on the grounds that its registration should be annulled or terminated rather than revoked.

Special case: orders

74. Where a judge of the Federal Court Trial Division has reasonable grounds to believe a registered charity is causing significant and irreversible public harm, he or she may issue an *ex parte* order to immediately suspend the charity's status as a qualified donee, impose such other measures to prevent the harm as are warranted by the circumstances, or both. "Public harm" should be defined to include using tax-subsidized donations for non-charitable purposes, and misleading the general public that they can use their contributions to claim a charitable tax benefit, or that their contributions will be used for a charitable purpose.

Spelling out the requirements in legislation

75. The *Income Tax Act* should be revised to more clearly state certain basic provisions (as described in the text of the report) for obtaining and retaining registered status.



Appendix 2

The Consultation Process

Appendix 2

The Consultation Process

Given the potential impact of its recommendations on both the voluntary sector and government, the Table consulted with a wide range of organizations and individuals prior to finalizing its report and recommendations.[1]

The Table released an interim report and highlights document in early August 2002 to solicit comments and advice. The consultation papers were published in a number of ways:

- Information about the Table's work, consultation schedule and a call for input was published in the CCRA's *Registered Charities Newsletter* (June and August editions) which was distributed to all 78,000 charities.
- A notification letter was sent to 462 voluntary sector organizations, umbrella groups, provincial and territorial government officials and interested individuals, which included an invitation to participate in the consultation process.
- The consultation papers were made available on the Voluntary Sector Initiative website. The website also provided access to 13 research papers prepared for the Table.
- Public notices were posted on the CCRA, Canadian Centre for Philanthropy and The Muttart Foundation websites with links to the consultation materials.
- A media advisory was issued to all major media outlets.
- Public service announcements were made on local cable stations across Canada.

Following the release of its interim report, the Table led three streams of consultations with the voluntary sector and other interested parties:

- Public forums were held in 21 locations from September 3, 2002 through to October 25, 2002. At least two Table members were present to facilitate each session, including one from government and one from the sector. The Table also consulted with staff from the Charities Directorate.
- In each city, the Table also made time available to receive a limited number of presentations. This was an opportunity for interested organizations and individuals to provide specific feedback on the Table's proposals. In total, 21 voluntary sector organizations and professional associations made presentations.
- Individuals and organizations were also invited to submit briefs or respond online. The Table received 24 formal submissions.

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[1] As mentioned earlier in this report, the Table assisted with the simplification of the annual information return and the development of guidelines for "related business" activity. Separate consultations were conducted on these matters by the CCRA.

In addition to the Table's activities, umbrella organizations also consulted widely with their member and client groups.

In total, 524 representatives from 388 organizations participated in the consultations. Participation came mainly from local and national charities (66%). Smaller numbers attended from non-profit organizations and professional associations (17%), federal, provincial and territorial government departments (11%), and the private sector (6%).

To help focus the discussion during the consultation, participants were invited to provide their comments on key discussion points. During the public forums, comments were captured anonymously and detailed notes on each session were circulated to the Table on a weekly basis. This allowed Table members who were not present to "hear" what was being said at the sessions.

At the conclusion of the consultations, the comments captured during the public forums were combined with comments received during the hearings and in writing. The raw feedback was used to prepare an analytical report that summarized the input received on specific topics.

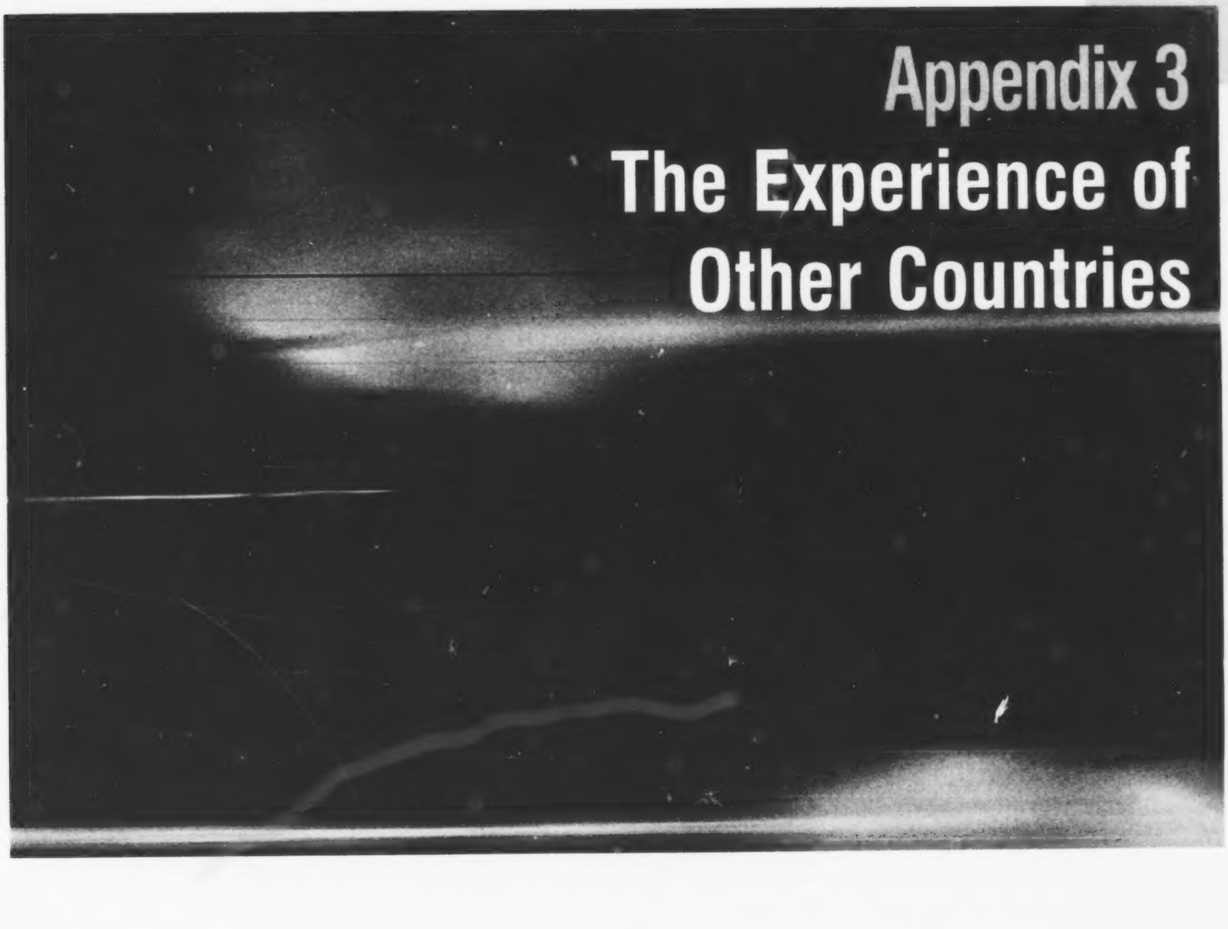
List of centres in which consultations were held

City	Dates
Charlottetown	September 3
Moncton	September 4
Fredericton	September 6
Halifax	September 9
Sydney	September 10
St. John's	September 12
Montréal	September 16
Québec City	September 17
Calgary	September 19
Edmonton	September 20
Vancouver	September 23–24
Yellowknife (via video conference)	September 23
Whitehorse (via video conference)	September 23
Victoria	September 25
Kelowna	September 27
Ottawa/Gatineau	October 9
Toronto	October 15–17
London	October 18
Saskatoon	October 21
Regina	October 22
Winnipeg	October 25

The Table then used the analytical report to assess the implications and degree of support for the Table's interim recommendations. As discussed in the report, the Table modified some of its preliminary conclusions based on the advice it received during the consultations. However, many of the Table's central recommendations received general support.

Appendix 3

The Experience of Other Countries



Appendix 3

The Experience of Other Countries

The Charity Commission for England and Wales and the Canadian context

At this time, the only jurisdiction which has delegated authority to determine registration and deregistration issues to a separate agency is England and Wales. In developing Models 3 and 4, we looked to this example. While there are some similarities, the Canadian Charity Commission model described in this report has different powers from the one serving England and Wales.

An important distinction is that the Charity Commission for England and Wales administers the *Charities Act*, which is not the functional equivalent of the *Income Tax Act*. The Act gives the Charity Commission for England and Wales jurisdiction over all matters concerning charities including regulatory powers that in Canada fall under provincial jurisdiction, such as providing support and advice to ensure charities have good administrative practices and are effectively organized.

Currently, the central role of the federal regulator in Canada – under any institutional model – is to reflect the intent of Parliament through how it administers the charity provisions of the *Income Tax Act*.

The *Charities Act* gives the Charity Commission for England and Wales a number of powers that are not constitutionally available in Canada, which makes comparison sometimes difficult. These powers include the power to ignore previous court decisions where circumstances have changed and to exercise joint powers with the court in certain administrative functions. This gives the Charity Commission for England and Wales some justification for being regarded as a quasi-judicial body.

Finally, as a standalone agency, the Charity Commission for England and Wales does not report to a minister on its regulatory decisions, although it does report through a minister on its annual performance.

Accessibility and transparency

In the **United States**, the *Internal Revenue Code* provides for public access to both annual returns and to the applications of organizations that are accepted for tax-exempt status. Non-qualifying organizations are not subject to these provisions. Access can be obtained either from the Internal Revenue Service, or from the organization, which, if requested to provide the information, must promptly do so free-of-charge, or face a monetary penalty.

In connection with applications, the following must be made available:

- the application form;
- all documents and statements the Internal Revenue Service requires the organization to file with the form;
- any statement or other supporting document submitted by the organization in support of its application; and
- any letter or other document issued by the Internal Revenue Service concerning the application.

In **England and Wales**, the *Charities Act* requires the Charity Commission to maintain a register containing the name of every registered charity and any other information the Commissioners order. The register is open to public inspection, as are "copies (or particulars) of the trusts of any registered charity as supplied to the Commissioners."

Charities' annual reports and accounts sent to the Commission are open to public inspection, either at the Commission's office or by means of a photocopy, for which there is a copying charge. Members of the public can also review the accounts of any charity by making a written request to the charity. The charity can charge a fee to cover processing costs, but must meet the request within two months. Failure to do so renders the directors liable to prosecution and a fine.

Reports on inquiries undertaken by the Commissioners may be published as they see fit.

As a non-Ministerial government department, the Commission is subject to the *Freedom of Information Act 2000*, which is broadly similar to the Canadian access to information legislation. The Commission has issued some "operational guidelines" on the subject. Access to information held by the Commission is still subject to a number of restrictions, including:

- correspondence can still be kept confidential;
- cases can still be settled on the understanding that there would be no publicity;

- pre-decision discussions can be kept confidential if the balance of the public interest lies with non-disclosure; and
- a person seeking the names and addresses of a charity's trustees will be referred to the single correspondent and address identified on the website.

In practice, the Commission has identified organizations by name, giving reasons for its decisions, both positive and negative. This practice appears to be becoming less frequent. On its website, individual charities are most often named in connection with the Commission's inquiry powers.

Appeals

In the **United States**, all applications to the Internal Revenue Service for tax-exempt status are handled centrally, in Cincinnati. An organization that receives an initial adverse determination of tax-exemption (or a letter proposing to revoke an existing exemption) may seek recourse from a separate branch of the Internal Revenue Service (the Appeals Office), by filing a protest within 30 days. The protest letter must include details such as the aspects of the original decision the organization disagrees with, the facts supporting its position, and the law or authority on which it is relying. If requested, a conference can be held, but otherwise the procedure can be conducted by correspondence or telephone. Appeals Office staff can only determine cases according to established precedents and policy. Where there are no established precedents and policy, the matter is referred to head office in Washington. The organization also has the option of having the file referred directly to Washington.

In addition, organizations can go directly to court[1], rather than using the Appeals Office, or they can go to court if they disagree with the decision of either the Appeals Office or head office. If the court finds the organization to be the "prevailing party," it can recover its administrative and litigation costs.

In **England and Wales**, if the Charity Commission[2] decides an applicant does not qualify for registration, it writes to explain why. The organization may write back if it disagrees with the Commission's decision or considers the Commission has misunderstood the application. Such a response triggers an internal review of the decision. The reviewer is independent of the original decision makers. If the review upholds the negative decision, the organization can then ask for a review by the head of the legal department and ultimately by the Commissioners sitting as a board. If the decision is still negative, the organization can then go outside the

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[1] The court in question would generally be the equivalent of the Canadian Tax Court.

[2] The Charity Commission also has a system in place to handle complaints about its service, as opposed to its decisions. A complainant can turn to an Independent Complaints Reviewer after he or she has exhausted the commission's internal procedures.

Commission and appeal to the High Court.[3] Very few cases have gone to the English courts from the Charity Commission in recent years.

An organization facing removal from the register on the grounds that it no longer appears to be a charity can also ask for an internal review of the preliminary negative decision. It remains on the register until the review is complete, but its name is removed if the reviewer issues a negative decision. At that point, the organization has a statutory right of appeal to the High Court.

Third-party interventions are permitted. The *Charities Act, 1993* allows "any person who is or may be affected by the registration of an institution as a charity" to object to the Commission on the grounds that the organization is not a charity. They also may proceed to court if the Commission disallows their objection.

Intermediate sanctions

At the federal level, the **United States** introduced new intermediate sanctions in the form of excise taxes in 1996 (those marked with an asterisk in the list below),[4] although there were a number of pre-existing remedies in the *Internal Revenue Code*. Among the sanctions now available to the Internal Revenue Service are:

- a per diem fine on the organization for failure to file the annual return on time or filing an incomplete return;
- a fine of $20 a day on an organization's employee who refuses to provide a copy of the organization's annual return to a member of the public who has requested it;
- a tax equal to a percentage of the amount spent on partisan "political activities" and of the amount above the allowable limit spent on "lobbying";
- a tax on income from unrelated businesses;
- penalties on the organization for issuing inaccurate donation receipts as part of a promotion in order to understate tax;
- a tax on persons in a position to exercise substantial influence over a charity's affairs, for any "excess benefit" they receive from the charity; and
- taxes of varying rates against private foundations for engaging in self-dealing, for not meeting a minimum spending amount, for excess business holdings, for making imprudent investments, and for making payments for a non-charitable purpose.

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[3] The approximate Canadian equivalent of the High Court would be the Federal Court Trial Division or the trial division of the provincial superior courts.

[4] The new intermediate sanctions are being gradually phased in, and the Table is not aware of any analysis having yet been made of their effectiveness.

The Internal Revenue Service also uses its website listing of charities to encourage filing on time. Only the names of organizations that are up-to-date in their filing appear on the site.

The *Code* allows the Internal Revenue Service to enter into "closing agreements" to settle accounts with any taxpayer with finality. Organizations have a strong incentive to negotiate such an agreement, to avoid the loss of their tax exemption. (However, there is no equivalent of the Canadian revocation tax.) Such agreements can include payments to cover Internal Revenue Service costs, but their chief aim is to prevent a recurrence of the problem. To that end, the Internal Revenue Service will go deeply into an organization's operations and require, for example, the restructuring of its board. The closing agreement may also include a provision allowing for publication of the details as part of the settlement.

In **England and Wales**, the Charity Commission does not exercise sanctions equivalent to the deregistration and revocation tax found in Canada. While the Commission can remove non-charities from the register, the focus of its efforts is on protecting charitable property and taking action against individual directors or trustees. Thus, there are no financial penalties on organizations, although non-compliant charities are publicly identified.

In practice, the main sanction is holding an inquiry under section 8 of the *Charities Act*. If the Commission's investigators find "misconduct" or "mismanagement" (the terms are not defined), the Commission can invoke a wide range of powers that in Canada are associated with provincial jurisdiction, including:

- appointing a receiver and manager to replace an existing board;
- freezing the charity's assets;
- removing a director or employee; and
- making a scheme that could totally change the constitution of the charity concerned.

Charities are publicly identified when the results of these inquiries are posted on the Commission's website. The Commission has also listed the names of charities that were two years behind in their filing requirements. The practice has become known as "naming-and-shaming."

It is also an offence under the *Charities Act*, punishable with a fine, for any "person" not to meet the filing requirements imposed by the legislation. Other offences are also identified. In these cases, the Commission hands the matter over to the police to lay charges. The law allows for the free flow of information among the Commission, the police, and various governmental authorities, including the local authorities that license various forms of fundraising.

Institutional models

In our review of institutional arrangements, we examined the situation in other common law jurisdictions (England and Wales, Scotland, the United States, Australia and New Zealand).

In a majority of jurisdictions we examined, revenue officials initially make the decision as to whether an organization is charitable. This approach is based on the assertion that revenue officials are non-partisan in their determinations of charity registrations and that the tax authority is in the best position to administer the system of tax deductibility, including determining which organizations are eligible for tax exemption.

At this time, the only jurisdiction that has delegated authority to determine registration and deregistration issues to a separate agency, is England and Wales. It is important to note, however, that the government in New Zealand has announced that it will proceed with the establishment of a commission as well. Some commentators have suggested that the delegation of registration decisions and ongoing regulation to a separate agency is justified on the basis of the expertise the Charity Commission has developed in relation to a wide range of charitable matters, including areas that fall under provincial jurisdiction in Canada. This broad-ranging jurisdiction is constitutionally unavailable in Canada.

Under the *Charities Act*, Commissioners have the general function of promoting the effective use of charitable resources by:

- encouraging the development of better methods of administration;
- giving charity trustees information or advice on any matter affecting charity; and
- investigating and checking abuses.

There have been some recent developments in other jurisdictions that may be of interest. It should be kept in mind, however, given the different mandates and nature of these inquiries, that their findings are not necessarily transferable for the purposes of this review.

In Australia, a recent inquiry into the definition of charities and related organizations recommended establishing a national, independent administrative body for charities and related entities. It also recommended that the government seek the agreement of all state and territory governments to establish the administrative body.

Like Canada, primary jurisdiction over charities in Australia rests with regional governments. The Australian experience suggests a model for the transfer of federal authority to a separate administrative body should the provinces and territories also agree to delegate their jurisdiction over charities to such an agency.

In Scotland, the Scottish Charities Office has responsibility for supervising organizations that have been recognized as charities by Inland Revenue or by the Charity Commission for England and Wales. This includes monitoring compliance with charities legislation and investigating concerns about misconduct and mismanagement.

As a result of a recent inquiry into charity regulation, Scotland is also considering transferring oversight responsibilities for charities to a commission similar to the Charity Commission for England and Wales. Among its findings, the Scottish Charity Law Review Commission report recommends that the new body have the dual role of protecting the public interest and providing an effective support and regulatory system for charities. However, supervising and regulating charities in Scotland is not shared with regional governments, as is the case in Canada.

An inquiry into the registration, reporting and monitoring of charities in New Zealand, released in February 2002, examined three alternatives for the structure of its regime. This included a Charities Commission; a semi-autonomous body within an existing government department with a statutory advisory board from the charitable sector; and a business unit within an existing government department.

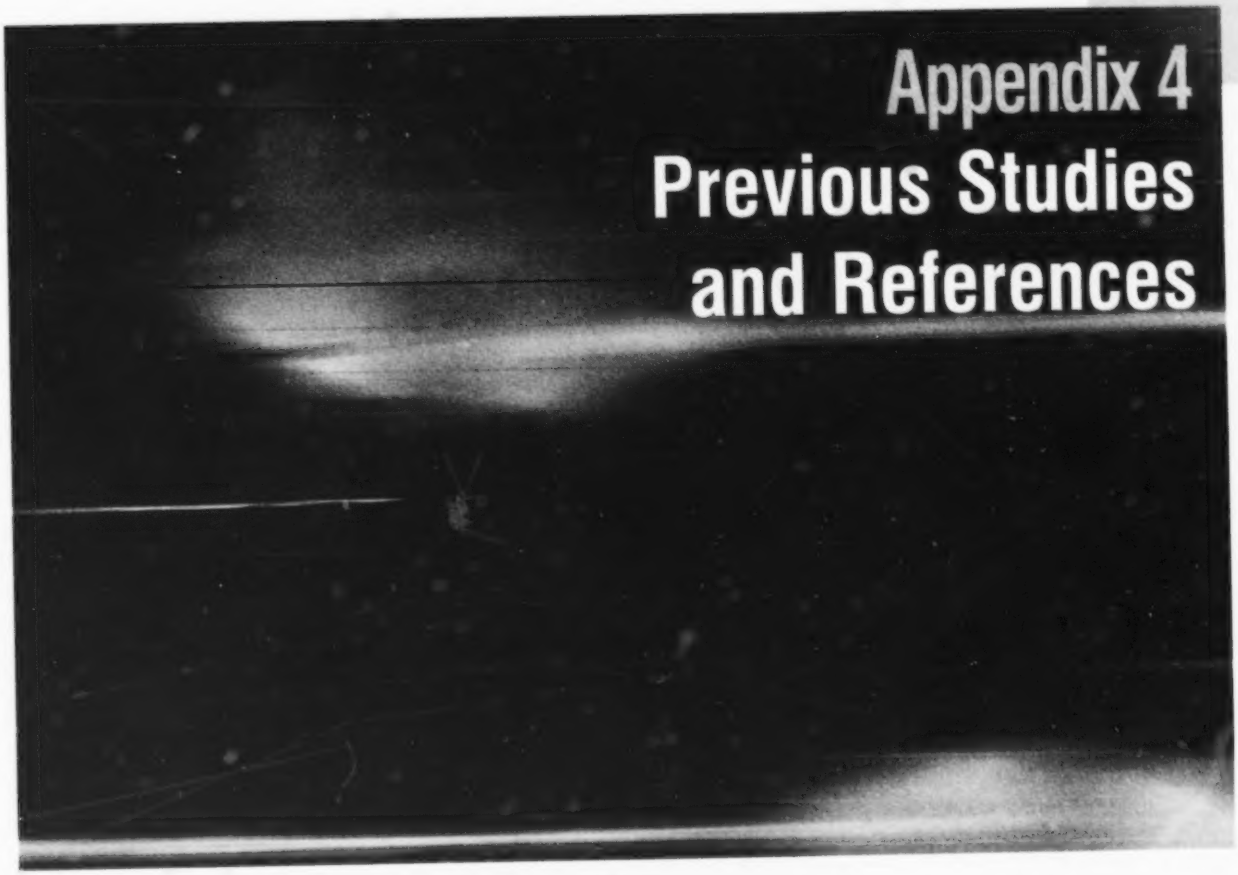
The inquiry preferred a Commission for Charities to assume responsibility for the registration, reporting and monitoring of New Zealand charities. It recommended that the commission be established as a new crown agency with its own statute and regulations. It based its decision on the belief that a Charities Commission would be most acceptable to the charitable sector and that this would mean the costs of monitoring and enforcement would likely be less if the sector supports and has confidence in the organization.

The Crown would appoint Commissioners, with a majority drawn from the charitable sector. The new commission would act as a "one-stop shop" for the legislative requirements of charities.

The inquiry also recommended that the Charities Commission be required to report annually to the sector, and to the government through the Minister of Finance, and to the Minister responsible for the Community and Voluntary Sector. Presently, charities must apply to Inland Revenue (department of taxation) to obtain charitable status. The government of New Zealand has now accepted the recommendation of the inquiry and is moving to a commission model.

Appendix 4

Previous Studies and References



Appendix 4

Previous Studies and References

Accessibility and transparency

In 1996, the Ontario Law Reform Commission published its *Report on the Law of Charities*. The *Report* included a number of proposals regarding the federal registration of charities under the *Income Tax Act*. It noted that the Charities Directorate deals with some 4,000 applications and deregisters some 2,000 organizations each year, and in almost all cases there is no public record of the decision. It urged the Directorate to publish an annual report along the lines of that published by the Charity Commission for England and Wales.

Three years later, the Broadbent Panel in its report, *Building on Strength: Improving Governance and Accountability in Canada's Voluntary Sector*, pointed to the lack of transparency in the registration process and with regard to the CCRA's policies. The Panel considered that applications for, and decisions regarding, registrations should be considered public information. As well, the regulatory authority should routinely publish guidelines for interpreting the "grey" areas of the law.

The issue of transparency received considerable attention by the Table on Improving the Regulatory Framework. In its contribution to *Working Together: A Government of Canada/Voluntary Sector Joint Initiative* (1999), it defined transparency as covering informing, reporting, responding to requests for information, and conducting one's affairs in a manner that can be easily observed and understood. It felt that the existing system was far from this standard, and the result was that registration was perceived to be administratively complex and difficult to understand. Transparency was needed to provide guidance to organizations on how the common law was being administered and interpreted. The Table wanted the registration process to be as wide open as allowable under the *Privacy Act*, and it felt that third-party interventions at the registration stage would be desirable. However, it considered that little information should be available on the compliance side. The fact that an organization has been investigated should not be released, because this fact alone could be prejudicial, even though the audit might well reveal no significant problems.

Patrick Monahan, in his paper "Federal Regulation of Charities" (2000), also noted that the CCRA's decisions are shrouded in secrecy and in effect unreviewable. As well, given the dearth of court precedents, the lack of policy statements was all the more regrettable. Monahan called for a transparency regime operated under the principles of the access to information and privacy legislation, as well as an annual report pointing out significant decisions.

In an earlier paper "Charities, Public Benefit and the Canadian Income Tax System" (1998), Arthur Drache pointed to the confidentiality provisions in the *Income Tax Act* as responsible for leaving practitioners in complete ignorance of what types of organizations were or were not being registered, and urged that key decisions should be published. Drache and Laird Hunter, in their paper, "A Canadian Charity Tribunal for Canada" (2000), urged that registration decisions be removed from the CCRA and put into another institution, in part to escape the confidentiality provisions of the *Income Tax Act* and thus permit an adequate explanation of registration decisions.

Appeals

An overriding concern of the Ontario Law Reform Commission in its *Report on the Law of Charities* (1996) was to work towards the harmonization of the federal and provincial regulatory schemes. To this end, it suggested that the province having jurisdiction over a particular organization should have at least the right to comment at the administrative stage and the right to intervene in any court proceedings. More generally, the *Report* would allow all third parties to intervene at the judicial stage, subject to the approval of the court.

The *Report* was critical that the only recourse mechanism provided in the *Income Tax Act* was an appeal to the Federal Court of Appeal. Given the need for expertise in charity law, the *Report* favoured creating an intermediate tribunal devoted exclusively to deciding questions of charity law. However, it felt that reducing administrative costs and providing procedural fairness, openness, and a more fully developed record might be more easily achieved by using an existing recourse mechanism – the Tax Court. Hearings would be conducted along the lines of an appeal from a tax assessment, which is fundamentally a hearing *de novo*.

The *Report* also recommended that applicants should have an automatic right of appeal if the Charities Directorate has not decided on an application within 90 days, as opposed to the current 180 days.

Arthur Drache, in his paper "Charities, Public Benefit and the Canadian Income Tax System" (1998) came to a similar conclusion. He considered that reform was needed because costs and other constraints have limited the number of cases proceeding to appeal. His ideal solution was to create a "charity court" as a stand-alone body that would develop its own expertise, but the Tax Court would be an acceptable alternative. The procedure in the Federal Court of Appeal is, in his view, inappropriate. In a later paper, (Drache and Hunter, "A Canadian Charity Tribunal: A Proposal for Implementation" (2000)), the authors pointed out that the process in the Federal Court of Appeal is an appeal, and not a hearing *de novo*. This means that the responsibility is on the organization to prove that the Charities Directorate's decision was wrong. Also, the appellant organization does not have the right of examination for discovery, calling witnesses, and cross-examining the government's decision makers for potential bias.

In its report, *Improving Governance and Accountability in Canada's Voluntary Sector* (1999), the Broadbent panel also urged that the appeal process be made more accessible and less expensive, and proposed that appeals should lie to the Tax Court.

The Table on Improving the Regulatory Framework, in its contribution to *Working Together* (1999), criticized the existing system as being not easily accessible and too expensive. It stated that because only a few cases have been decided, there is insufficient guidance for the regulatory authority and the voluntary sector. This first Table indicated that reform of the system should allow for greater access to appeals and a richer accumulation of expertise by adjudicators.

Under all the models for a new regulatory structure for charities examined by the Table on Improving the Regulatory Framework, the proposal was that the recourse system allow for a hearing *de novo*. Tax Court was not recommended as the venue for such a hearing, but rather a newly created quasi-judicial body. If the initial decision making stayed with the CCRA, reconsideration of the initial decision by an internal review process should be established. The Regulatory Framework Table also recommended the use of alternative dispute resolution procedures as an alternative to court proceedings.

Patrick Monahan ("Federal Regulation of Charities" (2000)) regarded the current appeal process as anomalous and outdated. In his view, it places a considerable financial burden on an organization, requiring the organization to retain legal counsel and prepare significant documentation. The Federal Court of Appeal itself, he noted, had questioned a process that asks it to "review relevant questions of law and fact without the benefit of any findings of fact by a trial court and indeed without the benefit of any sworn evidence."[1] Monahan considered that a special tribunal to hold a hearing *de novo* would be the best option, but doubted that there would be sufficient workload to justify appointing such a body. Instead, he opted for the Tax Court as the logical place for hearings, with the organization having the option of using that Court's informal procedures.

[1] *Human Life International in Canada Inc. v. Minister of National Revenue* [1998] 3 F.C. 202.

Intermediate sanctions

All previous commentators have pointed to the need for intermediate sanctions, and have offered varying suggestions as to the form such sanctions should take.

The Ontario Law Reform Commission's *Report on the Law of Charities* (1996) proposed using penalty or excise taxes, either against the charity or culpable fiduciaries, and taking into account the importance of the provision in question and the severity of the non-compliance. Taxes collected in this way could go either to defray the cost of administering the legislation or to other charities in the sector. The *Report* also noted that the CCRA would have an effective lever to encourage compliance if charities had to get their blank donation receipts from the CCRA. The *Report* criticized the existing revocation tax as inconsistent with provincial trust law provisions. It recommended instead that a court transfer the assets of deregistered charities to another charity, and that these assets be protected in the meantime by making a type of sequestration or receivership available to the CCRA.

The Panel on Accountability and Governance in the Voluntary Sector (the "Broadbent Report," 1999) emphasized the need for the CCRA's compliance program to educate charities and give them a chance to resolve identified problems. It proposed a range of compliance actions, including providing information, publicity, and fines, before resorting to deregistration.

The Table on Improving the Regulatory Framework made a number of suggestions in *Working Together* (1999). It proposed that a dispute resolution process should be available when the infraction is due to ignorance or when the infraction itself is in dispute. Among possible intermediate sanctions, *Working Together* recommended that:

- monetary penalties apply only where a donor or a charity realizes an unlawful monetary gain;
- the right to issue official donation receipts could be suspended;
- publicity can be a powerful sanction and could be combined with a system of formal orders directing a charity to comply; and
- any intermediate sanctions should be accompanied with an appropriate appeal mechanism.

In his paper "Federal Regulation of Charities" (2000), Patrick Monahan endorsed the proposals put forward in *Working Together.* Arthur Drache, in "Intermediate Sanctions" (1999), suggested a number of possible financial penalties. As a general rule, he would impose the penalty against the organization, rather than the directors or employees. However, if the non-compliance involved an improper transfer of property from the charity, the sanction should be on the person receiving the property.

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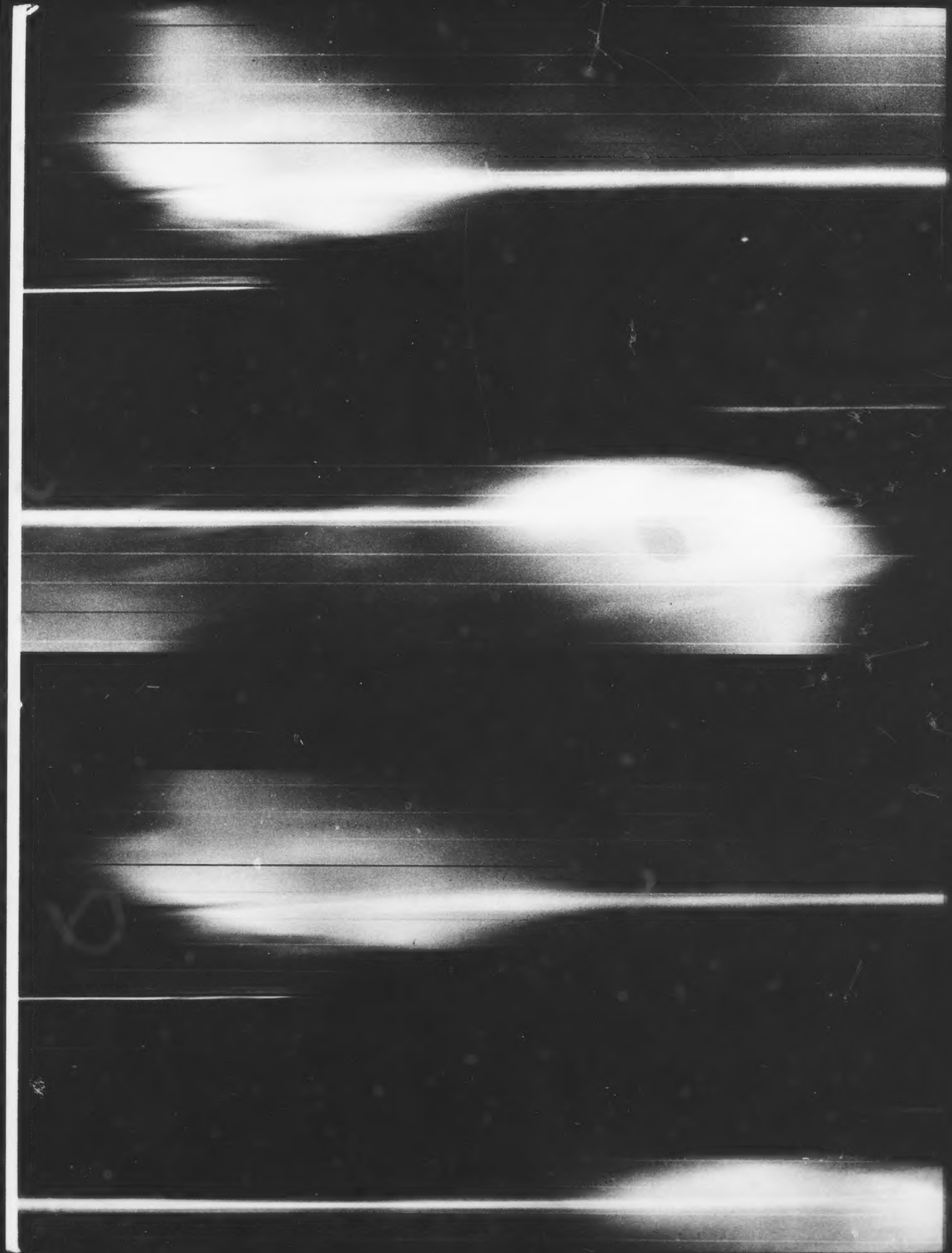Second Report by the Working Party on Registration, Reporting and Monitoring of Charities. New Zealand (May 2002). (Available at: http://www.treasury.govt.nz/charities/).